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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 619

S. B. ALLEN, ET AL.,

Petitioners,

v.

W. LEWIS DAVID, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit. The basic and fundamental issue is the power and authority of respondents to make retroactive cancellations of rice farm acreage allotments and marketing quotas issued under the Agricultural Adjustment Act of 1938, as amended (hereinafter called the Act) and to assess and collect marketing penalties based upon such cancellations. Special and important reasons exist for the granting of a writ of certiorari as is shown at pages 7 to 10 herein.

OPINION BELOW

The District Court without written opinion made findings of fact and conclusions of law (R. 358) upon which this suit

was dismissed for lack of jurisdiction. (R. 352) Thereafter, the District Court granted an injunction to preserve the status quo pending appeal. (R. 356) Respondents' motion to dissolve the injunction was denied by the Fifth Circuit on November 28, 1962 without written opinion.

The opinion of the Court of Appeals for the Fifth Circuit will be found at pages 3a to 20a of Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals is dated July 16, 1964, and was entered on the same date. Petitioners' motion for rehearing was overruled without opinion on August 20, 1964. The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

Two basic questions are presented in this case, both of which involve important questions of federal law. The first question relates to the interpretation and administration of an Act of Congress, and the second to an important concept of federal jurisdiction. These questions may be briefly described as follows:

(1) Do respondents, the subordinates of the Secretary of Agriculture, have the statutory power and authority under the Act to cancel retroactively rice farm acreage allotments and marketing quotas and to impose penalties based upon such cancellations?

(2) Do the Federal courts have jurisdiction to enjoin the performance of acts by respondents which are beyond their statutory power and authority, and which conflict with statutory provisions?

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Several provisions of the Agricultural Adjustment Act of 1938 (52 Stat. 31) are involved. Sections 1301(b)(10)(A), 1304, 1352, 1353(a)(b), 1354, 1356(b), 1361, 1362, 1363, 1367, 1368 and 1371 of Title 7, U.S.C. (1958) are herein cited and are set out verbatim in Appendix B. Regulations involved which were effective for the 1962 crop year include 7 C.F.R. §730.1303, §730.1304, §730.1011(g)(2), §730.1021(d) and (e) (1963) which are set out in Appendix C.

STATEMENT OF THE CASE

This suit involves the application and construction of the Agricultural Adjustment Act of 1938, as amended. The petitioners (plaintiffs below) brought this suit individually and on behalf of all Texas rice farmers similarly situated seeking an injunction against respondents* and the classes they represent on the ground that respondents were exceeding their statutory power and authority. Jurisdiction was invoked under 28 U.S.C., Sec. 1331, because the suit arises under an Act of Congress and the jurisdictional amounts were involved, and under 28 U.S.C., Sec. 1337, because the suit arises under an Act of Congress regulating commerce. The complaint is found at pages 14-28 of the record.

Respondents' actions of which petitioners complained were (1) retroactively cancelling rice farm acreage allotments and marketing quotas, (2) assessing substantial penalties based upon the retroactive cancellations of the allotments and quotas, and (3) the cancellation — without prior notice or hearing — of marketing cards or the with-

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* Respondents are all local officials of the Agricultural Stabilization and Conservation Service, United States Department of Agriculture.

holding of such cards which are necessary to market the petitioners' crops.

The trial court, after trying the case on the merits and making findings of fact and conclusions of law (R. 358), dismissed the complaint for lack of jurisdiction. (R. 353)

Realizing that serious questions are involved and that grave and irreparable injury would be suffered by petitioners and the class they represent should it be in error in its rulings, the trial court granted an injunction pending appeal prohibiting any additional cancellations of allotments, quotas and marketing cards. (R. 356-7) On November 28, 1962, the Fifth Circuit denied respondents' motion to dissolve this injunction.

The material facts are undisputed and only issues of law are presented.

The record and the trial court's finding show that the petitioners are rice farmers who received 1962 farm acreage allotments and marketing quotas pursuant to the provisions of the Act. None of the named petitioners planted an acreage to rice in excess of their acreage allotments and quotas, and each was notified that he had no excess acreage. (Findings Nos. 11, 6(f), 7(f), 8(f), 9(f), R. 362, 364, 366, 368)

No appeals were filed by petitioners from the original determination of their farm marketing quota (Findings No. 10, R. 369) and hence such quotas became final under the Act and not subject to any downward modification. (7 U.S.C., Sec. 1363)

In reliance upon their quotas, petitioners planted, produced, irrigated and partially harvested their 1962 crop at an average cost in excess of $100 per acre. (R. 18) Each of the petitioners had borrowed against his crop

and had executed crop liens to the lending institutions.[1] (R. 105, 134, 158, 168)

Beginning in August of 1962, at the peak of the harvesting and marketing season, respondents began the wholesale cancellations of marketing cards theretofore issued, such cancellations being done without prior notice or hearing to the farmers involved. (Finding No. 3, R. 360) Marketing cards, which should have been issued to producers, were arbitrarily withheld. Since buyers in the normal course of business refuse to buy rice unless the farmer has a marketing card or certificate (Finding No. 18, R. 371), petitioners were unable to market their crops which in turn required that they store their rice at burdensome cost and expense. (R. 169-71, 186) Some of the farmers could not locate nearby storage and drying facilities and were required, in addition, to bear the cost of transportation to distant facilities. (R. 171)

Respondents' activities created what was termed at the trial "distress rice" — rice which the farmer for one rea son or another felt compelled to sell — and as a consequence, the market price generally was down during the period that marketing cards were being cancelled. (R. 71-73) More than 300 marketing cards were cancelled or withheld. (R. 69) The allotments and quotas of at least 190 farmers were in question and respondents threatened to accord the same treatment to each and every rice farmer (approximately 3800) in the state. (R. 77, 310-11)

This was the status of the controversy at the time this

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[1] Several of these creditors made application to intervene, and were permitted to adduce evidence. At the conclusion of the trial, the court denied them leave to intervene. A separate appeal was filed by them from the judgment denying them the right to intervene. The Fifth Circuit affirmed this action of the Trial Court.

suit was filed. While no official action had been taken with respect to the allotments and quotas of any of the named petitioners, they were unable to market their crops due to the cancellation or withholding of marketing cards.

Ten days *after* this suit was filed, the allotments and quotas of six of the named petitioners were cancelled in part. (Stipulation, R. 58-60) The allotment and quota of the other named petitioner (Kenneth Cox) was not decreased, and the sum of $26,527.35 cash which Cox had been required to place in escrow with respondents in order to market his crop, was returned to him. (R. 152) Respondents had the use of this money without paying interest for more than six weeks. (R. 156)

Following the cancellations of their allotments and quotas, some of the farmers in the class represented by petitioners had been assessed penalties of $4.06 per hundred pounds of rice produced on the cancelled allotment and quota. As the trial court found, respondents intended to assess such penalties against the named petitioners. (Finding No. 14, R. 370)

The case was tried on the merits in early October, 1962. No answer to the verified complaint was filed. Respondents' pleading in the trial court was limited to a motion to dismiss. (R. 29)

The Fifth Circuit held that it was unnecessary to determine whether respondents' actions were beyond their statutory power and authority, and held that the trial court properly dismissed the case for lack of jurisdiction. The effect of the decision is to hold that even though respondents have exceeded their statutory power to the irreparable injury of petitioners, the Federal courts are powerless to interfere.

ARGUMENT ON THE REASONS WHY THE WRIT SHOULD BE GRANTED

(A.) IMPORTANCE OF THE QUESTIONS INVOLVED

The presentment of important questions relating to the administration of an Act of Congress is a familiar ground invoked by this Honorable Court in granting writs of certiorari. See, e.g., *Stark* v. *Wickard*, 321 U.S. 288, 88 L. Ed. 733 (1944); *H. P. Hood & Sons* v. *United States*, 307 U.S. 588, 83 L. Ed. 1478 (1939); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 92 L. Ed. 10 (1947); *Secretary of Agriculture* v. *Central Roig Refining Company*, 338 U.S. 604, 94 L. Ed. 381, (1950); *Commissioner* v. *Acker*, 361 U.S. 87, 4 L. Ed. 2d 127 (1959). Similarly, the Court has granted writs of certiorari where important questions of judicial administration pertaining to the exercise of federal equity jurisdiction are presented. *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 83 L. Ed. 1184 (1939). Both of these questions are here involved.

Evidencing the importance of the Agricultural Adjustment Act, various questions under the Act have been before this Honorable Court on three prior occasions: *Wickard* v. *Filburn*, 317 U.S. 111, 87 L. Ed. 122 (1942), *Mulford* v. *Smith*, 307 U.S. 38, 83 L. Ed. 1092 (1939) and *Rodgers* v. *United States*, 332 U.S. 371, 92 L. Ed. 3 (1947). Not only does the Act influence greatly the business of farming, it is intended to and undoubtedly has affected significantly the price paid by consumers for the regulated commodities.

The general scheme of the Act is to control the volume of agriculture products moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high prices and obstructions to commerce. *Wickard* v. *Filburn, supra.* To effect the adjustment between farmer and consumer, the Secretary

of Agriculture determined in December, 1961 pursuant to the Act that 1,817,856 acres of rice should be produced without marketing restrictions in the crop year 1962. 7 C.F.R. § 730.1303; § 730.1304 (1963). Proclamation of the national acreage allotment occurred prior to December 31, 1961, as required by Congress. 7 U.S.C. § 1352. This quota was duly approved by more than 66⅔% of the rice farmers in the country as required by 7 U.S.C. § 1354.

In August and September, 1962, after the rice crop had been planted, harvested and was in the process of being marketed, subordinates of the Secretary of Agriculture in effect reduced the 1962 national acreage allotment for the 1962 crop year by 8,900 acres by imposing marketing restrictions on the rice crops of the Texas farmers. Such acts are plainly at variance not only with the general scheme of the Act, but also with specific provisions thereof.

The power and authority of the administrators of the Act to cancel or revise retroactively farm acreage allotments and marketing quotas has never been determined by this Honorable Court. That question is a significant and important one in the administration of the Act. At least three cases considering the question have been recently decided by lower courts: *Hasty* v. *Carter*, 123 S.E. 2d 563 (Ga. App. 1961), *Morrow* v. *Clayton*, 326 F. 2d 36 (10th Cir. 1963), and *Kephart* v. *Wilson*, 219 F. Supp. 801 (D.C. Tex. 1963) which is now pending in the Fifth Circuit. Additionally, there are at least 8 cases pending in the Southern District of Texas involving the same question. Two other cases have dealt with the allied question of the retroactive assessment of penalties subsequent to the harvesting and marketing of the crops involved. *United States* v. *Harvey*, 131 F. Supp. 493 (D.C. Tex. 1954); *United States* v. *Lynn*, 132 F. Supp. 605 (D.C. Ky. 1955).

The importance of the questions involved to petitioners and the class they represent is cogently illustrated by a recent occurrence in the case at bar. On October 22, 1964, while this petition was being printed, respondents filed in the Court of Appeals a motion to dissolve the injunction granted by the trial court pending appeal, which motion appears as Appendix D to this petition. The Court will observe that respondents are urging the dissolution of the injunction so that rice allotments and marketing quotas for 1959 through 1961 may be retroactively cancelled and penalties imposed. In their motion, respondents represent to the Court that "numerous rice acreage allotments and rice marketing quotas" are involved, which aggregate at least 9,455 acres. The monetary penalties which respondents would claim to be due would substantially exceed $1,000,000.

While the merits of the case are indeed significant and of national interest, the jurisdictional questions are of equal if not greater importance. On this phase of the case, the opinion of the Fifth Circuit conflicts with analogous opinions of this Honorable Court. If the Fifth Circuit is right, the Federal Courts have no jurisdiction to deal promptly and effectively with the exceeding of power and authority by federal officers and agents, and an important segment of federal jurisdiction has been emasculated.

Petitioners respectfully submit that the Fifth Circuit opinion begs the question. If respondents' acts are indeed within their statutory power and authority, then the Court's opinion can be justified. On the other hand, if as petitioners contend, there is no statutory warrant for respondents' acts, then it necessarily follows that the Federal Courts have jurisdiction since the case turns upon the construction and application of an Act of Congress regulating commerce.

Petitioners accordingly turn first to the question of the interpretation of the Act on the merits of the case.

(B.) CANCELLATIONS OF FARM ACREAGE ALLOTMENTS AND MARKETING QUOTAS AND THE IMPOSITION OF MARKETING PENALTIES BASED THEREON ARE BEYOND RESPONDENTS' STATUTORY POWER AND AUTHORITY

Petitioners submit that respondents' actions are beyond their power and authority for the following reasons:

(1) Congress specifically withheld from respondents the power and authority to cancel retroactively farm acreage allotments and marketing quotas.

(2) Retroactive cancellations of farm acreage allotments and marketing quotas conflict with the general scheme of the Act, as well as with specific provisions thereof.

(3) The imposition of marketing penalties based upon the cancellations constitutes an unauthorized administrative act.

(1) The Power to Cancel or Revise Farm Acreage Allotments and Marketing Quotas was Specifically Withheld by Congress

There is no provision in the Act which grants power to the Secretary or his subordinates to cancel any farm allotment or quota retroactively. To the contrary, the provisions of the Act show that such power was specifically withheld.

Section 1363 of Title 7 U.S.C. provides as follows:

"Any farmer who is dissatisfied with his farm marketing quota may within fifteen days after mailing to

> him of notice as provided in section 1362 of this title, have such quota reviewed by a local review committee composed of three farmers from the same or nearby counties appointed by the Secretary. Such committee shall not include any member of the local committee which determined the farm acreage allotment, the normal yield, or the farm marketing quota for such farm. *Unless application for review is made within such period, the original determination of the farm marketing quota shall be final.*"*

The trial courts found the facts relative to this statutory provision in findings 10 and 11. (R. 369) Finding No. 10 is as follows:

> "None of the named plaintiffs appealed from the original notices of their 1962 farm acreage allotment and marketing quota as set forth in findings 6(e), 7(e), 8(e) and 9(e)."

Finding of Fact No. 11 is as follows:

> "Based upon such original determinations of their farm acreage allotments and marketing quotas, none of the named plaintiffs have acreage on their farms planted to rice in excess of their farm acreage allotment and marketing quota."

No appeals having been filed, the petitioners' farm marketing quotas were final under the Act and were not subject to any downward modification or adjustment.

Even in the absence of a Congressional declaration of finality, this Honorable Court has frowned upon any effort by administrative agencies to revoke licenses or certificates except where authorized by Congress.

In the case of *Civil Aeronautics Board* v. *Delta Airlines*, 367 U.S. 316, 6 L. Ed. 2d 869 (1961), the CAB sought to

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* Emphasis supplied throughout unless otherwise indicated.

alter a certificate of convenience and necessity theretofore issued. Congress had specifically granted such power to be exercised in a particular way. The Board failed to act in the manner provided and relied upon its inherent powers. This Court said that "the determinative question is not what the Board thinks it should do but what Congress has said it can do." *Ibid.* at 322, 6 L. Ed. 2d at 874. In affirming the Circuit Court and holding that the Board could reconsider only in the manner Congress provided, this Court held that *"both administrative and judicial feelings have been opposed to the proposition that the agencies may expand their powers of reconsideration without a solid foundation in the language of the statute. . ."* *Ibid.* at 334, 6 L. Ed. 2d at 881.

And in *United States* v. *Seatrain Lines,* 329 U.S. 424, 91 L. Ed. 396 (1947), the Interstate Commerce Commission sought to revoke in part a certificate of public convenience and necessity issued to Seatrain. Congress in 1940 had placed water carriers for the first time within the jurisdiction of the Interstate Commerce Commission. However, there were no statutory provisions which would empower the ICC to revoke certificates issued to such carriers. This Court affirmed the judgment of the trial court holding that the ICC had no power to revoke the certificate even though when issued it carried the notation that it was subject "to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission." There was specific statutory authority "to suspend, modify, or set aside its orders . . . in such manner as it shall deem proper." This Court held, however, that the word "order" did not include certificates and then said, 329 U.S. at 432, 91 L. Ed. at 401:

> "Section 315 of the Act, having specific references to orders, and which in subsection (c), here relied on,

> authorizes suspension, alteration, or modifiction of orders, nowhere mentions the word 'certificate'. It is clear that the 'orders' referred to in section 315(c) are formal commands of the Commission relating to its procedure and the rates, fares, practices, and like things coming within its authority. But, as the Commission has said as to motor carrier certificates, while the procedural 'orders' antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding. The certificate, when finally granted and the time fixed for rehearing it has passed, is not subject to revocation in whole or in part except as specifically authorized by Congress. Consequently, the Commission was without authority to revoke Seatrain's certificate . . ."

This is not a case like *Bousche* v. *Udall*, 373 U.S. 472, 10 L. Ed. 2d 491 (1963) where Congress has invested the Secretary of Interior with continuing supervision over land in the public domain. This Court there held an oil and gas lease was subject to administrative cancellation to correct administrative errors in timely proceedings instituted by competing applicants for the same land reasoning that the line of demarcation was whether "as a result of the transaction 'all authority or control' over the lands had passed from the Executive Department . . . or whether the Government continues to possess some measure of control over them." In the case of farm allotments and quotas, there is no statutory provision remotely suggesting that control exists for the year then current after the quota and allotment have issued to the farmer. There is no reason for such control. The national and state allotments have been apportioned, the crops have been planted, etc.

Fortifying this construction of the Act is the provision in section 1363 above quoted that unless the farmer appeals within fifteen days, the original determination of his farm marketing quota shall be *final*.

Respondents respectfully submit that there can be only one "original determination" and that the respondents and the courts below have ignored the words "original" and "final".

In *Lasky* v. *Commissioner of Internal Revenue,* 235 F. 2d 97 (9th Cir., 1956) the power of the Tax Court to reconsider determinations previously made by it was called in question. In that case, the statute defined the Tax Court as an administrative agency and provided that decisions were "final" if no petition for review had been filed within a certain time. The Tax Court entertained the taxpayer's motion to vacate its decision after the time provided had expired. The Circuit Court held, however, that after the initial decision became final under the statute, the administrative agency had no power to reconsider it.

The Court pointed out that the 6th Circuit in another case had ignored the statutory provision and had set aside a decision on the ground of mutual mistake of fact. The 9th Circuit soundly criticizes the decision of the 6th Circuit. Resolving the conflict between the circuits, this Court at 352 U.S. 1027, 1 L. Ed. 2d 598 (1957) affirmed the judgment in the *Lasky* case and therefore approved the holding that once an administrative determination is final pursuant to statute, the administrative agency has no power or jurisdiction later to modify or to reconsider the original decision.

To leave not the slightest doubt about it, Congress in Section 1368 of the Act provided as follows:

> "Notwithstanding any increase of any farm marketing quota for any farm as a result of review of the determination thereof under this part, the marketing quotas for other farms shall not be affected."

It is thus apparent that even in cases where a review committee may increase the farm marketing quota of one or many farmers, and even though the state and national acreage allotments are thereby exceeded, Congress still refused to permit the Secretary to have the power to reduce the marketing quota of other farms.

Respondents argued in the lower courts that "final" used in § 1363 of the Act applies to the farmer but not to them.

The comments of this Honorable Court in *Brownell* v. *Tom We Shung,* 352 U.S. 180, 1 L. Ed. 2d 225 (1956) are appropriate here.

> "But to darken the meaning of the word 'final' as used by Congress by giving it chameleonic characteristics is to indulge in choplogic." 352 U.S. at 185, 1 L. Ed. 2d at 229.

(2) Cancellations are Contrary to the General Scheme of the Act as well as to Specific Provisions Thereof

As has already been noted, the general scheme of the Act is the control of the volume of the regulated commodities moving in interstate commerce to avoid surpluses and shortages. *Wickard* v. *Filburn, supra.* The Act, accordingly, plainly has prospective application only. *Hasty* v. *Carter,* 123 S.E. 2d 563 (Ga. App. 1961).

The national rice acreage allotment applicable for the following year is declared each year prior to December 31. 7 U.S.C. § 1354. Within thirty days thereafter a referendum of farmers is had to determine whether such farmers are in favor of or opposed to such quotas. 7 U.S.C. § 1354. Notice of the farm acreage allotment is supposed to be mailed to the farm operator prior to the date of the referendum. 7 U.S.C. § 1362.

Section 1353(a) provides that the national acreage allotment *shall* be apportioned to the states, and Section 1353(b) provides that the state allotments *shall* be apportioned to farms owned or operated by persons who have produced rice in the state in any one of the five calendar years preceding the year for which such apportionment is made.

The effect of cancellations (such as these here complained of) is to disregard the statutory command that the national acreage allotment and state acreage allotments *shall* be apportioned because a portion of the state acreage allotment (in this case 8,900 acres) is then withdrawn from apportionment on a retroactive basis. In 1962, instead of being able to market 464,552 acres of rice without marketing restrictions, Texas farmers were permitted to market without restrictions only 455,652 acres of rice.

To balance the interests of the farmer and the interests of the consumer, Congress created not only a ceiling, it also created a "floor" below which the Secretary and his subordinates could not go.[2]

The "floor" in the plainest of terms is the acreage necessary to produce the normal supply (7 U.S.C. § 1352) — i.e., the rice necessary for human consumption and export and an allowance for carry-over. 7 U.S.C. § 1301(b)(10)(A) The "floor" for 1962 was determined to be 1,817,856 acres, the national acreage allotment.

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[2] The legislative history shows Congressional concern that the normal supply of rice be produced. Both the Senate Report (Senate Report 1295, 75th Congress, Second Session, page 11) and the House Report (House Report No. 1645, 75th Congress, Second Session, page 9) provide as follows:

"The total of the apportionment to producers shall not be less than the normal supply of rice, thereby protecting consumers against the possibility of a shortage in the rice supply and consequent increase in price of rice."

The portion of the "floor" allotted to the State of Texas was 464,552 acres. 7 C.F.R. § 730.1304 (1963). Petitioner Allen's farm was in turn allowed 163 acres of the "floor". (R. 107) The farms of the other petitioners were similarly allowed portions of the "floor" acreage.

The existence of the "floor" was so important to Congress that the Secretary of Agriculture (1) was specifically enjoined from using any powers under the Act to discourage production of the "floor" acreage (7 U.S.C. § 1304) and (2) to increase the national acreage allotment in the event he determined that the farmers were not producing the "floor". (7 U.S.C. § 1371)

By virtue of respondents' acts, the Secretary and his subordinates went beneath the "floor" in 1962 and 8,900 acres into the "basement".

In neither of the courts below have respondents denied or explained in any way this clear and radical departure from Congressional commands.

(3) The Imposition of Marketing Penalties Based Upon the Cancellations Constitutes An Unauthorized Administrative Act

It is axiomatic that penalty statutes are strictly construed. In *Commissioner* v. *Acker*, 361 U.S. 87, 4 L. Ed. 2d 127 (1959), this Court said:

> "We are here concerned with a taxing act which imposes a penalty. The law is settled that 'penal statutes are to be strictly construed', Federal Communications Comm. v. American Broadcasting Co., 347 U.S. 284, 296, 98 L. Ed. 699, 709, 74 S. Ct. 593 and that 'one is not to be subjected to a penalty unless the words of the statute plainly impose it', Keppel v. Tiffin Sav. Bank, 197 U.S. 356, 362 49 L. Ed. 790, 792, 25 S. Ct. 433 . . ." (*Ibid.* at 91, 4 L. Ed. 2d at 131).

The Court in that case held invalid a regulation which attempted to levy a monetary penalty which Congress did not provide.

The penalty provisions of the Agricultural Adjustment Act are likewise to be strictly construed. *United States* v. *Whittle,* 190 F. Supp. 826, (D.C. Va. 1960), aff'd, 287 F. 2d 638 (4th Cir. 1961); *Hasty* v. *Carter,* 123 S.E. 2d 563 (Ga. Ct. App. 1961).

The penalty provisions of the Act were construed by this Court in *Rodgers* v. *United States,* 332 U.S. 371, 92 L. Ed. 3 (1947). In that case, the Supreme Court held:

> " . . . The purpose of Congress in requiring payment of penalties into the Federal Treasury for marketing above the allotted amount was not to raise revenue for the Government's financial advantage but to deter farmers from planting and marketing more than their quotas."
>
> "In fact, the whole philosophy of the Agricultural Adjustment Act is based on the theory that the public will be benefited, not damaged, if farmers produce and market within these quotas, thereby avoiding the payment of penalties. The framework of the Act itself, both as originally passed and as amended, and reports of the Congressional Committee that drafted it, shows a prime purpose to limit national and individual farm production and marketing to the quotas alloted, *and show that the penalties were solely intended to deter the farmers from exceeding those quotas . . .*" *Ibid* at 374, 22 L. Ed. at 7.

When construed in accordance with the authorities, it is plain that it is the act of planting an acreage to rice in excess of the farm acreage allotment — and no other act — which subjects the farmer to penalty. Section 1356(b) of Title 7 provides as follows:

> "The farm marketing excess of rice shall be regarded as available for marketing and the amount of penalty shall be computed upon the normal production of the acreage on the farm *planted* to rice in excess of the farm acreage allotment . . ." [3]

Petitioners have planted within the farm acreage allotment and marketing quota determined for their farms. Thus, no penalty enacted by Congress is due. The penalty provisions have accomplished what Congress "solely intended" by providing for them. *Rodgers* v. *United States, supra.*

The penalties complained of by petitioners are being imposed by respondents for a wholly different purpose; that of punishing petitioners for the violation *by others* of the Secretary's regulations.

Regulations 730.1021 (e) (Appendix, p. 34a) promulgated by the Secretary of Agriculture is the only authority ever cited by respondents as a source of their power to do the acts complained of. In the Fifth Circuit, respondents argued that this regulation was valid on the ground that it was necessary to implement still another regulation, Regulation 730.1021 (d) (Appendix, p. 33a).

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[3] Congress adopted identical penalty provisions for rice, cotton and wheat in 1949. With respect to the cotton penalty provisions, the Senate Report shows the following:

> "The fair marketing quota under the bill is the actual production of the acreage planted to cotton on the farm less the 'farm marketing excess'. The farm marketing excess is the normal production of that acreage planted to cotton on the farm which is in excess of the farm acreage allotment . . ."
>
> *"Under the provisions of the bill any farmer who plants within his farm acreage allotment would be entitled to market his entire production free of penalty . . ."* (1949 U.S. Code Cong. Ser., at p. 1891)

See also *Rigby* v. *Rasmussen*, 275 F. 2d 861 (10th Cir. 1960) in which the Court held that the act penalized by Congress is that of overplanting the allotment.

As petitioners have already pointed out, in 7 U.S.C. § 1353(b) Congress required that the state allotment be apportioned to farms owned or operated by persons who have produced rice in any one of the past five years. Under Regulation 730.1021(d), several non-statutory requirements are added: in addition to having farmed for one of the past five years, the allotment holder must be "actively engaged in the production of rice" in the current year, which is defined in Regulation § 730.1011 (g) (2) to mean (1) actively participating as a producer in farming operations necessary to produce and harvest a crop of rice, (2) sharing in a predetermined and fixed portion of the rice crop, or the proceeds thereof (3) at the time of harvest (4) by virtue of having furnished the land, labor, water or equipment necessary to produce and harvest the crop.[4] 7 C.F.R. § 730.1011 (g) (2) 1963).

Thus, as the regulations are construed by respondents, Miss Louise Bonnet — for example — an elderly spinster, must have been actively engaged in the production of rice on petitioner Allen's farm else her allotment was subject to being withdrawn retroactively under Regulation 730.1021 (e).

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[4] The validity of this regulation (730.1021(d)) may be seriously questioned as adding requirements not made by Congress. As the Court said in *Secretary of Agriculture* v. *Central Roig Refining Company*, 338 U.S. 604, 94 L. Ed. 381 (1950), "In making quota allotments the Secretary of Agriculture must of course keep scrupulously within the limits set by the Sugar Act of 1948 . . ." That question may be passed, however, because it is ever so plain that 730.1021 (e) is invalid. See pp. 23 to 25 infra. Petitioners point out parenthetically that the requirement of furnishing land, labor, water or equipment has now been dropped. Effective for the 1963 crop year, a farmer can furnish allotment only and still be "actively engaged in the production of rice". Regulation 730.1011(g) (3); 28 Fed. Reg. 175 (1963).

Petitioners do not question the validity of 730.1021 (e) insofar as it may authorize a reduction in Miss Bonnet's allotment *for subsequent years* by affecting the rice producing history for which she is credited. This would be consistent with Congressional intent that persons farming in past years be granted an allotment in the year then current. Petitioners do most earnestly question the validity of the regulation if it be construed as respondents have construed it — as affording the basis for retroactively penalizing the Allen petitioners because Miss Bonnet was not actively engaged in the production of rice.

This much is plain: marketing penalties have been imposed on the Allen petitioners, for example, because — and only because — Miss Bonnet violated the Secretary's regulations. *But a violation of the regulations — either intentionally or unintentionally — is not an act penalized by Congress by the imposition of marketing penalties as respondents seek to do and have done.*

The power to declare penalties by administrative fiat has been uniformly denied by the courts. The power to declare crimes or penalties is solely a function of Congress and not a function possessed by or even delegable to administrative agencies. *United States* v. *Grimaud,* 220 U.S. 506, 55 L. Ed. 563 (1910); *United States* v. *Eaton,* 144 U.S. 677, 36 L. Ed. 591 (1891). The authorities are summarized in 42 *Am. Jur.,* Public Administrative Law, Sec. 50, page 355, as follows:

> "Administrative authorities may be empowered to enact rules and regulations having the force and effect of law, *but any criminal or penal sanction for the violation of such rules and regulations must come from the legislature itself.* Administrative authorities may not initiate such sanctions. To declare what shall constitute a crime and how it shall be punished is a power vested solely in the legislature, and it may not be delegated

> to any other body or agency. *Prescribing of penalties is a legislative function,* and a commission may not be empowered to impose penalties for violations or duties which it creates under a statute permitting it make rules. However, the legislature may validly provide a criminal or penal sanction for the violation of the rules and regulations which it may empower administrative authorities to enact."

Congress has frequently provided for penalties for violations of subordinate regulations promulgated by executive or administrative officers. See, e.g., statutes in *United States* v. *Grimaud, supra;* however, there is *no* provision in the Agricultural Adjustment Act to that effect.

In the *Hasty* case (123 S.E. 2d 563), *supra,* defendants sought to penalize the act of fraud in obtaining a tobacco allotment. As in the case at bar, the farmer had planted within his farm acreage allotment and marketing quota. While the rice provisions of the Act penalize the act of planting in excess of the allotment, the Act, as it concerns tobacco, penalizes the marketing of tobacco in excess of the quota. 7 U.S.C., Sec. 1314. The Court denied defendants the power to penalize any act other than marketing in excess of the quota, and held as follows:

> "The penalty provisions of 7 U.S.C.A. Sec. 1314 relate to crops marketed in excess of the quota in effect at the time the marketing is done, or to the crops marketed which are unaccounted for or are falsely identified. *They do not seek to penalize to producer for obtaining an allotment by reason of fraud or erroneous information.* The penalty provisions are subject to strict construction, U. S. v. Whittle, D.C., 190 F. Supp. 826, affm'd. 7 Cir. 287 F. 2d 638. The government has other means at hand to punish these acts without extending the clear meaning of this part of the statute." *Ibid* at 565.

The case of *Manhattan G. E. Co.* v. *Commissioner of Internal Revenue,* 297 U.S. 129, 80 L. Ed. 528 (1935) is an oft-cited authority on the validity of regulations adopted pursuant to an Act of Congress. In that case, a regulation promulgated by the Commissioner of Internal Revenue was in question. In the course of its opinion, the Supreme Court held as follows:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law — for no such power can be delegated by Congress — but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. Lynch v. Tilden Produce Co., 265 U.S. 315, 320-322, 68 L. Ed. 1034-1036, 44 S. Ct. 488; Miller v. United States, 294 U.S. 435, 439, 440 70 L. Ed. 977, 980, 981, 55 S. Ct. 440 and cases cited . . ." *Ibid* at 134, 80 L. Ed. at 531.

To the same effect are the cases of *Woods* v. *Benson Hotel Corp.,* 117 F. 2d 543 (8th Cir. 1949), *Commissioner of Internal Revenue* v. *Clark,* 202 F. 2d 94 (7th Cir. 1953), and *Hamilton National Bank* v. *District of Columbia,* 156 F. 2d 843 (D.C. Cir. 1946) cert. den. 338 U.S. 891, 94 L. Ed. 547 (1949).

Similarly, it is elementary that regulations are "valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined". *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 79 L. Ed. 49 (1934). A regulation cannot alter or amend the statute and is invalid if it is "no more than an attempted addition to the statute of something which is not there". *Commissioner* v. *Acker,* 361 U.S. 87, 4 L. Ed. 2d 127 (1959). Of course, any regulation is invalid which conflicts with a statutory provision. *United States*

v. *Maxwell*, 278 F. 2d 206 (8th Cir. 1960); *Boykin* v. *Commissioner of Internal Revenue*, 260 F. 2d 249 (8th Cir. 1958).

Regulation 730.1021(e), as respondents attempt to construe it, is invalid under any of the tests of invalidity.

If the regulation purports to authorize downward adjustments in the marketing quotas, it conflicts with 7 U.S.C., Sec. 1363, in which Congress provided that the original determination of the farm marketing quotas shall be final, as has already been discussed.

If the regulation purports to authorize the retroactive cancellation of marketing quotas and the assessment of penalties based upon such cancellations, it is nothing more than an attempted addition or amendment to the statute.

Not only is the regulation invalid on the above grounds, it is also invalid as creating a rule out of harmony with the statutory scheme as is shown at pages 15 to 17 hereof, and is not consistent with or relevant to any expressed congressional purpose.

The proof conclusively showed and the trial court found that less rice than the 1962 state allotment was produced in Texas. (Finding No. 20, R. 372). Hence, respondents' activities have no relation whatsoever to the control of overproduction. Nor do those activities have any relation to protection of the consumer and, in fact, they operate to deprive the consumer of rice which Congress has determined should be produced and marketed. As we have shown at page 16 of this brief, the framers of the Act specified that *not less* than the normal supply (the "floor" or national acreage allotment) shall be apportioned. Respondents' activities have resulted in an apportionment of less than the national allotment; the cancelled allotments are not apportioned for 1962. (R. 219-20)

Congress in Sec. 1304 (7 U.S.C.) entitled "Consumer Safeguards" specifically stated that the powers conferred by the Act should not be used to discourage production of what in effect is the national acreage allotment. Respondents are doing precisely what Congress has enjoined them from doing.

Instead of legislating administratively and adopting a course contrary to that expressed by Congress, respondents have other remedies. If Miss Bonnet, for example, has in fact misused her allotment for 1962, and did not produce rice in that year, her allotment for subsequent years should be proportionately reduced under the regulations and 7 U.S.C. § 1353(b).

Additionally, Congress provided in 7 U.S.C. § 1376 that "the remedies and penalties provided for herein shall be in addition to, and not exclusive of, any of the remedies or penalties under existing law". If there has been a fraud perpetrated here (which petitioners deny), the Government has its remedy under the civil fraud statute (31 U.S.C. § 231) or the criminal fraud statute (18 U.S.C. § 1001). It is well-settled that the Government can maintain suits in its own courts to recover damages or to enforce its governmental rights to aid in the execution of its valid governmental policies. *Griffin* v. *United States*, 168 F. 2d 457 (8th Cir. 1948); *United States* v. *Garcia & Diaz, Inc.*, 291 F. 2d 242 (2d Cir. 1961).

(C.) THE DISTRICT COURT HAD JURISDICTION TO ENJOIN ACTIONS BEYOND RESPONDENTS STATUTORY POWERS AND IN CONFLICT WITH STATUTORY PROVISIONS

(1) Basic Federal Jurisdiction Existed Under 28 U.S.C., Sec. 1331 and 28 U.S.C., Sec. 1337

The complaint alleges a cause of action arising under an Act of Congress regulating commerce, to-wit: the Agricultural Adjustment Act of 1938, as amended. Petitioners in the complaint claimed rights under the Act to market their crops free from penalties, which rights respondents were interfering with. (R. 17-20) It is apparent from the allegations of the complaint that the Court is called upon to construe and interpret the Act.

That basic federal jurisdiction exists under Title 28 U.S.C., § 1331 and § 1337, has been recognized repeatedly by the Courts where an issue calling for interpretation or application of federal law is presented in the complaint, even though the sole purpose of the suit is to challenge an order of a federal agency sought to be justified by a federal statute. *Association* v. *Westinghouse Electric Co.*, 348 U.S. 437, 99 L. Ed. 510 (1955); *Smith* v. *Kansas City Title & T Co.*, 255 U.S. 180, 65 L. Ed. 577 (1921); *Leedom* v. *Kyne*, 358 U.S. 184, 3 L. Ed. 2d 210 (1958); *Gully* v. *First Nat. Bank*, 299 U.S. 109, 81 L. Ed. 70 (1936).

Accordingly, basic federal jurisdiction exists under 28 U.S.C., § 1337 and under 28 U.S.C., § 1331 since the jurisdictional amount is involved with respect to each of the named petitioners. (R. 108, 136, 151, 160, 178)

(2) Basic Federal Jurisdiction was not Destroyed by 7 U.S.C., § 1367

Petitioners do not construe the opinion of the Fifth Circuit to hold that basic federal jurisdiction is not present.

Rather, the basis of the opinion seems to be that because of the review provisions of 7 U.S.C., §1367 (Appendix, p. 29a), the federal courts have no jurisdiction until the administrative process has run its course no matter how oppressive or unlawful respondents' actions might be, and regardless of the character or extent of the irreparable injury that is sustained as a consequence. Petitioners submit, however, that the review provisions of the Act are not applicable to the case at bar.

Petitioners were content with the allotments and quotas they had at the time this suit was filed. Respondents were interfering with petitioners' rights under the Act to market their rice crops, such interference being based upon respondents' claimed powers to cancel retroactively farm acreage allotments and marketing quotas and to assess penalties based thereon. The statutory administrative remedy was not available and the review provisions of the Act relied upon by the Fifth Circuit were not applicable. Petitioners' allotments and quotas were not cancelled until *after* the suit was filed. (Stipulation, R. 58-60). It is well-settled that the question of jurisdiction is determined at the time the complaint is filed, and that subsequent events do not alter jurisdictional facts. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 82 L. Ed. 845 (1938); *Home Ins. Co. of New York* v. *Trotter*, 130 F. 2d 800 (8th Cir. 1942); *Nichelson* v. *Nestles Milk Products Co.*, 107 F. 2d 17 (5th Cir. 1939).

The review provisions were not applicable for the additional reason that cancellations of allotments and quotas are not authorized by the Act.

Section 1361 of the Act (7 U.S.C., Sec. 1361) provides as follows:

> "This part shall apply to the publication and review of farm marketing quotas established for tobacco, corn,

wheat, cotton, peanuts, and rice, established under subtitle B."

These cancellations were not marketing quotas "established under subtitle B". Under petitioners' theory of the case, the cancellations are completely contrary to and in direct conflict with the provisions of subtitle B, and wholly beyond respondents' statutory power.

What was said by this Honorable Court in *Leedom* v. *Kyne*, 358 U.S. 194, 3 L. Ed. 2d 210 (1958) is appropriate here. In *Leedom* there had been no final order made by the N.L.R.B. and therefore, the order in question was not subject to judicial review under the National Labor Relations Act until the Board had issued an order restraining an unfair labor practice. The administrative process had not run its course and similar statutory provisions providing for "exclusive jurisdiction" exist under the Act there in question and under the Agricultural Adjustment Act. After pointing out, as petitioners' contend here, that jurisdiction existed under 28 U.S.C. § 1337 unless the review provisions of the Act destroyed it, the Supreme Court in *Leedom* held as follows:

> *". . . This suit is not one to 'review' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act . . . Surely, in these circumstances, a federal district Court has jurisdiction of an original suit to prevent deprivation of a right so given."*

Precisely the same situation is presented here. Respondents' actions are contrary to specific provisions of the Act in at least the following particulars: (1) respondents have ignored the statutory command in 7 U.S.C. § 1363

that the *original* determination of marketing quotas shall be *final;* (2) respondents have ignored the statutory command in 7 U.S.C. § 1353 that the national and state allotments *shall* be apportioned and have imposed marketing restrictions on the normal supply of rice, and (3) respondents have imposed and collected monetary penalties for acts not penalized by Congress. Moreover, the retroactive cancellation of allotments and quotas and the imposition of penalties based thereon is contrary to the entire scheme enacted by Congress.

In *Schilling* v. *Rogers,* 363 U.S. 666, 4 L. Ed. 2d 1478 (1960), there was in question the right of judicial review of an administrative determination made under the Trading With the Enemy Act. Section 7 (c) of the Act provides in part:

> "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter . . . transferred . . . to the Alien Property Custodian . . . shall be that provided by the terms of this act. . . "

Plaintiff in that case sought a remedy not provided by the Act. Although affirming the judgment that the district court lacked jurisdiction, the Court made this significant pronouncement:

> ". . . This is not a case in which it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that he has acted beyond the scope of his powers, *where the availability of judicial review would be attended by quite different considerations than those controlling here.* Cf., e.g., U. S. ex rel Accardi v. Shaughnessy, 347 U.S. 260, 98 L. Ed. 681, 74 S. Ct. 499; Leedom v. Kyne, 358 U.S. 194, 3 L. Ed. 2d 210, 79 S. Ct. 180." *Ibid* at 676, 4 L. Ed. 2d at 1485.

In providing for an administrative appeal to a group of three farmers appointed by the Secretary of Agriculture, (7 U.S.C. § 1363), Congress was plainly attempting to assure that the facts would be found by those familiar with local farming operations. *It is hardly to be assumed that Congress intended that three farmers untrained in law made legal interpretations.*

There are no facts in dispute in the case at bar. There is no question presented calling for the exercise of farming expertise. The discretion of administrative agencies or officers is not an issue. There is, in short, no reason to require exhaustion of administrative remedies and every reason for not invoking such a requirement. In a cancellation case (as opposed to the initial determination of a marketing quota) the axe has already fallen. Sanctions are imposed prior to the administrative hearing. Irreparable injury has already been sustained since petitioners' crops could not be marketed when their marketing cards were cancelled or withheld. (R. 68, 107, 160) Storage, interest and drying charges had already been incurred which cannot be recouped. (R. 72-74, 171, 186)

In *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 63 L. Ed. 772 (1919) this Honorable Court in a unanimous decision categorically rejected the precise point urged by respondents and adopted by the Fifth Circuit.

In *Skinner*, the Court held:

> "The defendants contend that the district court did not have jurisdiction of the subject-matter of this suit; because orders entered in a 4th section proceeding cannot be assailed in the courts; at least, not until after a remedy has been sought under Sections 13 and 15 of the Act to Regulate Commerce. This contention proceeds apparently upon a misapprehension of plaintiff's

> position. If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the Commission . . . and the findings thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law . . . But plaintiff does not contend that 75 cents is an unreasonably high rate, or that it is discriminatory, or that there was mere error in the action of the Commission. ***The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission*** . . . The district court properly assumed jurisdiction of this suit." *Ibid* at 563, 63 L. Ed. at 776.

The rule of the *Skinner* case is still the law. The case was very recently cited with approval by the Supreme Court. *Greene* v. *United States,* 376 U.S. 149, 11 L. Ed. 2d 576 (1964).

In *United States* v. *Donovan,* 178 F. 2d 876 (7th Cir. 1949) cert. dism'd. 340 U.S. 886, 95 L. Ed. 643 (1950), the Court held:

> "From the cases cited it seems clear that where it is asserted and the proof shows that the administrative body has failed to comply with the statute and has, therefore, acted without statutory authority, the District Court has jurisdiction of the proceedings. The rule requiring exhaustion of administrative remedies does not apply when the administrative body has exceeded its statutory authority." *Ibid* at 880.

See, also, e.g., *Varney* v. *Warehime,* 147 F. 2d 238 (6th Cir. 1945), cert. den. 325 U.S. 882, 89 L. Ed. 1997 (1945) (exhaustion of administrative remedies "is not an iron-clad rule and it has no application where the defect urged goes to the jurisdiction of the administrative agency . . ."); *Wettre* v. *Hague,* 168 F. 2d 825 (1st Cir. 1948) (since the complaint "alleges a violation of the plaintiffs' legal rights under the applicable statute as it is now construed, there is no longer any occasion for the requirement that they exhaust whatever administrative remedies they may have before seeking to vindicate their rights in court . . ."); *Pan American Petroleum Corp.* v. *Pierson,* 284 F. 2d 649 (10th Cir. 1960) cert. den. 366 U.S.. 936, 6 L. Ed. 2d 848 (1961) (since the defendants are without statutory authority administratively to cancel federal oil and gas leases, "we are not concerned with the contention that Pan American has failed to exhaust its administrative remedies . . .").

In *Stark* v. *Wickard,* 321 U.S. 288, 88 L. Ed. 733 (1944), the trial court had dismissed a complaint seeking to enjoin the enforcement of an order of the Secretary of Agriculture under the Agricultural Marketing Agreement Act. The Court of Appeals affirmed. In reversing the lower courts, this Court held:

> "The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. Cf. United States v. Morgan, 307 U.S. 183, 190, 191, 83 L. Ed. 1211, 1216, 1217, 39 S. Ct. 795. . . . But under Article 3, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Ibid* at 310, 88 L. Ed. at 748.

The Fifth Circuit suggests that only an action *ex delicto* for damages in state court would lie in the case at bar if, in fact, respondents are exceeding their statutory power and authority. Such a suggestion ignores, however, that petitioners have rights under the Act which are entitled to protection.

Immediate relief was necessary. Petitioners were suffering irreparable injury as is manifest from the granting by the trial court of the injunction pending appeal. An action in a state court for damages in tort is no answer to unauthorized Federal administrative power.

CONCLUSION

If the time is at hand — and the holding of the Fifth Circuit indicates that it is — that the arm of the Federal court is impotent because of the so-called doctrine of "exhaustion of administrative remedies" to restrain the oppressor or ignoramus, as the case may be, from exceeding and violating his authority under an Act of Congress, then an important phase of federal judicial authority has been lost. Such a loss would be a severe blow to the administration of justice in our land.

WHEREFORE, petitioners pray that a writ of certiorari issue to review the judgment of the court below.

Respectfully submitted,

.....

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CERTIFICATE OF SERVICE

In accordance with Rule 33 of the Supreme Court Rules, I hereby certify that copies of the foregoing Petition for Writ of Certiorari were duly served upon the Solicitor General, Department of Justice, and upon the United States Attorney for the Southern District of Texas by depositing same in the United States Mail with the required postage prepaid on this ..... day of October, 1964.

.....

Leon Jaworski

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1963

No. 20169

D. C. DOCKET No. 14528 — CIVIL

S. B. ALLEN, ET AL.,

Appellants,

v.

W. LEWIS DAVID, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Before HUTCHESON, RIVES and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREFORE, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged by this Court that the appellants, S. B. Allen, and others, be condemned in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

July 16, 1964

Issued as Mandate:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20169

S. B. ALLEN, ET AL.,

Appellants,

v.

W. LEWIS DAVID, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

(July 16, 1964.)

Before HUTCHESON, RIVES and GEWIN, Circuit Judges.

GEWIN, Circuit Judge: This is an appeal from the judgment of a district court[1] concluding that it lacked proper jurisdiction to adjudicate the question of whether the defendants' (appellees') actions concerning the cancellation of the plaintiffs' (appellants') farm acreage allotments and recall of their marketing quotas were within the authority granted them as functionaries of the Agricultural Stabilization and Conservation Service (ASCS) of the Department of Agriculture under the Agricultural Adjustment Act (Act) of 1938 as amended (Public Law 430, Seventy-Fifth Congress, 52 Stat. 31; 7 U.S.C.A. 1281 et. seq.), and regulations issued pursuant thereto under

[1] United States District Court for the Southern District of Texas.

authority granted in Section 375 (7 U.S.C.A. 1375) and 7 C.F.R. 730.1021(3), as amended. The district court consented to hear the case, which was filed as a class action pursuant to F.R.Civ.P. 23, and which sought injunctive relief. The complaint based jurisdiction on 28 U.S.C.A. 1331, 1337. After the cause was heard, the district court duly entered its findings of fact and conclusions of law.[2]

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[2] The conclusions of law are:

I

The actions found to have been taken by the County Committee and other officials and functionaries of the Department of Agriculture are within the authority granted to them by the Agricultural Adjustment Act of 1938 as amended (Public Law 430, Seventy-Fifth Congress, 52 Stat. 31; 7 U.S.C. 1281) and regulations issued pursuant thereto under authority granted in Section 375 (7 U.S.C. 1375) thereof; and particularly the regulation 7 CFR 730.1021(3) as amended.

II

The revised Notices of Farm Allotment mailed to the Plaintiffs herein constituted notices of farm acreage allotment within the meaning of Section 362 of the Act (7 U.S.C. 1362). Such notice is subject to review by a review committee pursuant to Section 363 of the Act and to further review by a Court pursuant to Section 365 and 366 of the Act.

III

Such review must be sought by the producer as an individual, and an independent determination must be made of the legal validity of the actions challenged in each individual case. A class action does not lie.

IV

Since the remedy provided in Sections 361-368 of the Act, inclusive (7 U.S.C. Sec. 1361-1368 inc.), is applicable, it is by express provision of Section 367 of the Act, exclusive.

V

The plaintiffs having failed to pursue the remedy provided in the Act, this Court has no jurisdiction to grant the relief prayed in the present proceeding.

VI

For the reason that Section 367 of the Act expressly deprives this Court of jurisdiction to grant the relief prayed, it is unnecessary to pass upon the further jurisdictional questions

Briefly stated, the facts are these: The plaintiffs are Texas rice farmers whose 1962 farm acreage allotments and marketing quotas were cancelled by the defendants.[3] They attack this cancellation and assert that: (1) such act was wholly beyond the power of the defendants to effect; (2) that substantial unwarranted penalties were assessed against them as a result of said cancellation; and (3) that they were unable to market their crop for the year in question because of the unauthorized recall of their marketing quota cards.

Pursuant to the provisions of the Act, a functional scheme is provided commencing with the Secretary of Agriculture. The Secretary is required to determine a national acreage allotment for rice after determining the

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raised by the defendants in their motion to dismiss pursuant to Rule 12(b) Federal Rules of Civil Procedure.

VII

No determination is made of the validity of the actions taken by the Department of Agriculture in the cases of the named Plaintiffs or of any in their class, for the reason that the merits of their claims are not before the Court.

VIII

The creditors of the Plaintiffs who have petitioned to intervene are not entitled to intervene as of right and, the Court having found that their interests are adequately represented by the present Plaintiffs, they should be denied leave to intervene.

IX

A decree should be entered denying the relief sought and dismissing this action.

[3] The defendants are sued individually and as representatives of the class described. All defendants are employees of the Agricultural Stabilization and Conservation Service (ASCS), U. S. Department of Agriculture. One defendant is State Executive Director, several defendants constitute County Committees of individual counties of the state, and other defendants are County Office Managers.

national marketing quota based upon the relationship between "total supply" of the commodity in question for the year and "normal supply", and to apportion the acreage allotment among the states. Apportionment of state acreage allotment among the counties is a function of the State Committee, subject to certain authorized reserves. The county allotment is apportioned by the County Committee pursuant to detailed regulations. The State Committee has certain supervisory powers over the County Committee. The County Review Committee is authorized to review the actions and decisions of the County Committee.[4] *Fulford* v. *Forman*, 245 F. 2d 145 (5 Cir. 1957). The important and broad functions required of the Secretary to administer and enforce the law make it necessary that the Secretary prescribe such regulations

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[4] As stated in *Fulford*, the function of the Review Committee may be described as follows:

> ". . . Important as is their task, especially as it bears upon the economic survival of their neighbors, the legislative pattern shows that the function of the County Committee is fairly to distribute that which has been allocated to that county. But since the standards to be followed are invariably general, and many are so flexible that they would open up avenues for discrimination whether intentional, inadvertent, corrupt, or accidental, there was need for another agency, the County Review Committee, having local roots and hence local responsibility for the review of such actions. The system assures not only initial determination, but a complete review anew of the whole matter by neighbors who must live with their decisions. The statutory requirement, note 4, supra, that members of the Review Committee must come from that or a nearby county and may not include a person who, as a county committee member, 'determined the farm acreage allotment, the normal yield, or the farm marketing quota for such farm' indicate quite positively that Congress meant to establish an initial and a reviewing agency of *local* people having *local* responsibility for decisions concerning *local* factors having a definitive *local* impact."

as are authorized and needful to the enforcement of the statutory scheme.[5]

None of the plaintiffs planted acreage to rice in excess of their original acreage allotments and quotas as fixed by the County Committee initially. However, upon receipt of information by the ASCS to the effect that there was an indication that applicable regulations had been violated and improper practices might have been employed by some applicants with regard to obtaining their allotments, an audit of rice allotments was initiated. The practices referred to concerned whether certain rice producers who had certified to the ASCS that they were engaged in the production of rice were, in fact, so engaged.[6] Based on the auditors' reports as interpreted by

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[5] We only undertake to set forth a brief sketch of the organizational scheme involved. The Act and the complex regulations implementing it are well explained by the numerous cases which have dealt with the subject and which make specific reference to the various code sections and regulations involved. Except for the statutes and regulations set forth in this opinion and in the footnotes, we deem it unnecessary to quote and discuss at length all such statutory provisions and regulations, or the decisions construing them. See *Fulford* v. *Forman*, (U.S.D.C., N.D. Texas 1956) 144 F. Supp. 536; (5 Cir. 1957) 245 F. 2d 145; *Morrow* v. *Clayton*, (10 Cir. 1963) 326 F. 2d 36.

[6] Under the Act, the County Committee must satisfy itself that the applicant for a farm acreage allotment will be "actively engaged in the production of rice." 7 CFR § 730.1021 (d).

To be actively engaged in the production of rice, the applicant must meet the definition of the term "engaged in the production of rice" as set out in ¶ (g) of 7 CFR 1011. It provides:

> "'Engaged in the production of rice' means, for 1960 and subsequent crops, actively participating as a producer in the farming operations necessary to produce and harvest a crop of rice on a farm and the sharing in a predetermined and fixed portion of the rice crop, or the proceeds thereof, at the time of the harvest by virtue of furnishing as landowner or landlord the land on which the rice is being produced, or by furnishing as tenant or sharecropper the labor, water or equipment necessary to produce and harvest

the general counsel, the defendants, pursuant to 7 CFR 1021(e),[7] initiated the actions about which complaint is herein made.

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the crop. A producer furnishing land must establish to the satisfaction of the county committee that he will have control of such land throughout the crop year, either through ownership or a valid lease. A producer furnishing labor, water or equipment must establish to the satisfaction of the county committee that he will furnish the labor, water or equipment necessary to produce and harvest an acreage of rice planted on the farm by virtue of his producer allotment contribution to the farm acreage allotment. Furnishing labor, water or equipment for only a phase of production or harvest shall not be considered engaged in the production of the crop. Notwithstanding the above, any producer having control over land that meets the definition of developed rice land, who requests the allocation of his producer allotment to a farm for the purpose of diverting an acreage from the production of rice under the conservation reserve program of the soil bank, shall be considered to be engaged in the production of rice. Any producer who the county committee finds, after allocation of the producer allotment to the farm, is not participating in the production of a crop of rice, shall not be deemed to be engaged in the production of rice on the farm in accordance with § 730.1021(e)."

[7] This section is as follows:

"(e) If the county or State committee has reason to believe, after the establishment of any farm acreage allotment in accordance with this section, that the tenant whose allotment acreage was allocated to such farm is not, or was not, in fact actively participating in the production of the rice crop produced on the farm in such year, a hearing shall be scheduled by the county committee and the tenant shall be invited to be present, or to be represented, at which time he shall be given an opportunity to substantiate his claim that he is, or was, actively engaged in the production of rice on the farm as indicated at the time of filing his request for the allocation of his producer allotment to the farm. If the county committee, with State committee approval, or the State committee finds that such tenant is not, or was not, actively participating in the production of the rice crop on the farm, except where allocation was made for the purpose of participating in the conservation reserve program or for the preservation of acreage, and therefore did not actively engage in the production of rice on such farm during the

Certain creditors of the plaintiffs also petitioned the district court for leave to intervene. The district court found that the interests of these creditors were adequately represented by the plaintiffs and denied them leave to intervene. These creditors, now appellant-lien creditors, have assigned the district court's refusal to grant their petition as error, thereby also placing that issue before us.

The district court concluded that the plaintiffs had been properly notified of the change in their farm acreage allotment within the meaning of the Act. 7 U.S.C.A. 1362 (see f.n. 1). The State Committee notified the County Committee, and the County Committee notified the farmers.[8]

Actions by the County Committee are subject to administrative review by a Review Committee pursuant to

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year in question, the county committee shall, with the approval of the State committee, recall such producer's allotment acreage previously allocated to the farm and adjust the farm rice acreage allotment accordingly. The county committee shall notify the farm operator of the revised farm acreage allotment. Such notice shall be on an official Form MQ-24, and will be accompanied by a letter of explanation as to the reason such action was taken to reduce the farm acreage allotment. A copy of the notice and letter shall be forwarded to all persons engaged in the production of rice on the farm. Any allotment acreage recalled by the county committee under this section shall not be available for apportionment or reallocation to any other farm."

[8] The State Committee informed the County Committee in each case by means of the following memorandum:
"UNITED STATES GOVERNMENT
MEMORANDUM

Section 1363 of the Act, and to further review by either the United States District Court or any State Court of

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To:
Office Manager
Jackson County ASCS

U. S. Department of Agriculture

From:
W. Lewis David
State Executive Director

Texas ASCS State Office
College Station, Texas
September 14, 1962

In Reply refer to:
4-CHG

Subject:

Report of Audit No. TEX (63) SR-5; Items III A 7, 8. Reference is made to the investigation report by the Internal Audit Division and the county committee hearing with respect to the rice farming operations of Allen Brothers, Louise Bonnot and Joe Bonnot.

This is to advise that, based on the evidence presented, the State Committee has determined that Louise Bonnot and Joe Bonnot were not actively engaged in the production of rice and the rice allotments of these producers should be recalled in accordance with Section 730.1021(e) of the regulations as set out in Rice Bulletin 1, Amendment 10.

The 1962 farm rice acreage allotment for farm G-71 shall be revised at this time to exclude the 13.3 acres contributed in the name of Louise Bonnot and the 10.3 acres contributed in the name of Joe Bonnot. Revised allotment notices shall be mailed to the interested producers with a letter of explanation. After this, you should proceed to determine the farm normal yield and the penalty for excess rice acreage in accordance with instructions. The producers should be notified of this penalty and be required to satisfy it by one of the methods provided for in the regulations."

Notice to the individual producer was as follows:

"Jackson County
September 18, 1962

Allen Brothers
Edna, Texas

Dear Mr. Allen:

This is to advise you that, based on the evidence presented, it has been determined that Louise Bonnot and Joe Bonnot were not actively engaged in the production of rice and the rice

general jurisdiction. 7 U.S.C.A. 1365, 1366.[9] The district

allotments of these producers are being recalled in accordance with Section 730.1021(e) of the regulations as set out in Rice Bulletin 1, Amendment 10. The 1962 farm rice acreage allotment for farm G-71 has been revised to exclude the 13.3 acres contributed in the name of Louise Bonnot and the 10.3 acres contributed in the name of Joe Bonnot. Enclosed is a revised allotment notice for Farm G-71.

If you have any questions, please contact the ASCS office.

Sincerely yours,
SAMUEL A. DODDS, JR.
Samuel A. Dodds, Jr.
County Office Manager
Jackson County ASCS
Box 430
Edna, Texas

Enc.

[9] These sections are:

"§ 1365. Institution of proceeding for court review of committee findings

If the farmer is dissatisfied with the determination of the review committee, he may, within fifteen days after a notice of such determination is mailed to him by registered mail or by certified mail, file a bill in equity against the review committee as defendant in the United States district court, or institute proceedings for review in any court of record of the State having general jurisdiction, sitting in the county or the district in which his farm is located, for the purpose of obtaining a review of such determination. Bond shall be given in an amount and with surety satisfactory to the court to secure the United States for the costs of the proceeding. The bill of complaint in such proceeding may be served by delivering a copy thereof to any one of the members of the review committee. Thereupon the review committee shall certify and file in the court a transcript of the record upon which the determination complained of was made, together with its findings of fact."

• • •

"§ 1366. Court review

The review by the court shall be limited to questions of law, and the findings of fact by the review committee, if supported by evidence, shall be conclusive. If application is

court determined that the remedy provided by the foregoing sections was exclusive, and that, in view of 7 U.S.C.A. 1367[10] it was wholly without power to grant the relief

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made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the review committee, the court may direct such additional evidence to be taken before the review committee in such manner and upon such terms and conditions as to the court may seem proper. The review committee may modify its findings of fact or its determination by reason of the additional evidence so taken, and it shall file with the court such modified findings or determination, which findings of fact shall be conclusive. At the earliest convenient time, the court, in term time or vacation, shall hear and determine the case upon the original record of the hearing before the review committee, and upon such record as supplemented if supplemented, by further hearing before the review committee pursuant to direction of the court. The court shall affirm the review committee's determination, or modified determination, if the court determines that the same is in accordance with law. If the court determines that such determination or modified determination is not in accordance with law, the court shall remand the proceeding to the review committee with direction either to make such determination as the court shall determine to be in accordance with law or to take such further proceedings as, in the court's opinion, the law requires."

[10] This section is as follows:

"§ 1367. Stay of proceedings and exclusive jurisdiction
The commencement of judicial proceedings under this part shall not, unless specifically ordered by the court, operate as a stay of the review committee's determination. Notwithstanding any other provision of law, the jurisdiction conferred by this part to review the legal validity of a determination made by a review committee pursuant to this part shall be exclusive. No court of the United States or of any State shall have jurisdiction to pass upon the legal validity of any such determination except in a proceeding under this part."

prayed for inasmuch as the plaintiffs had failed to properly pursue the remedy provided for by the Act.[11]

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[11] Some point is made in briefs as to the time sequence involved with respect to the investigation and actions taken by the State and County Committees and the fact that suit was filed prior to receipt of notice by farmers of final action by the Committees. After the usual and prescribed routine of filing applications for producer allotments, the issuance of notices as to farm acreage allotment and marketing quota, and notice of acreage had been issued by the County Committee, an investigation into certain practices and conduct was initiated in June 1962. There were two investigations. One was conducted by the F.B.I., and the other by the Internal Audit Division of the Department of Agriculture. None of the named plaintiffs were involved in the F.B.I. investigation, which related more particularly to fictitious producer allotments, and the only way such investigation is related to these proceedings would be a rather remote connection under the contention of the plaintiffs that they are entitled to represent all rice farmers in a class action. The cases of the named plaintiffs were investigated by the Internal Audit Division, which investigated more particularly the question of whether the holders of producer allotments were actually engaged in "the production of rice" on the farms to which their allotments had been allocated.

Early in August 1962 an audit report was submitted which contained information indicating the possibility that some of the producers were not actually engaged in the production of rice. On August 9, the County Committee mailed notices to producers advising them of a hearing to be held before the County Committee on August 13, 1962, with reference to the subject matter, and advising the producer of his right to be present personally and by counsel. On August 10, 1962, the County Committee gave notice to producers that marketing cards theretofore issued were cancelled. A hearing was held before the County Committee on August 13, 1962. On September 14, 1962, a United States Government Memorandum from the State Executive Director of the State Committee, U. S. Department of Agriculture, was issued to the office manager of the County Committee that, based on the evidence presented, the State Committee had determined that certain of the producers were not actually engaged in "the production of rice" and the rice allotment of the producers should be recalled and revised allotment notices issued, and penalties invoked for excess acreage. Thereafter (September 17-18) the County Committee issued such notices.

The plaintiffs assign the holding of the district court as error with respect to its interpretation of the Act and the powers granted defendants thereunder; and further, in their reply brief, contend that basic federal jurisdiction is present and that the trial court erred in not ruling to this effect. We are thus presented with issues relating to a judicial interpretation of the Act as well as issues relating to the existence of federal jurisdiction under the Act. By approaching the matter of jurisdiction first, it is unnecessary for us to reach the problems concerning our interpretation of the Act and the validity of the defendants' actions. To put it another way, we agree with the findings of the district court regarding its lack of jurisdiction, and therefore it is not necessary to consider the issues presented which are not related to the matter of jurisdiction.

The plaintiffs filed suit on September 7, 1962.

A number of forms are involved. No useful purpose would be served in undertaking to give the number, designation or general description of the various forms. It should be noted however that Form MQ-24-1 designated "Notice of Farm Acreage Allotment and Farm Marketing Quota" contained a notice on the front of the form calling attention to certain provisions on the reverse side, among which is the following:

> "1. REVISION OF ALLOTMENT. This allotment is subject to such changes as may be necessary under the procedure for determination of allotments for the designated crop year, taking into account (1) any incorrect data or information used in establishing this allotment or (2) any change in the total land in the farm for such year from that shown on the reverse."

Another form, No. 590, entitled "Notice of Acreage," issued by the County Committee, contains the following statement:

> "C. RICE — Unless the planted acreage is adjusted to the farm allotment in accordance with applicable regulations, a penalty will become due on the farm marketing excess, and rice produced on the farm will be ineligible for price support."

The specter of jurisdictional deficiency has haunted these proceedings throughout, and while the plaintiffs have attempted to steer a course through its murky waters, we are unable to follow their theories and contentions. Any constitutional questions concerning due process were laid to rest when the trial court, upon plaintiffs' own motion, ordered the "due process" allegation stricken from their complaint.

There are no personal rights of property created in the plaintiffs by the Act which would allow them to recover in a suit against governmental functionaries. The Agricultural Act is a public law, not a private law; therefore no vested rights may be obtained under it. *Dighton* v. *Coffman*, 178 F. Supp. 114 (D.C.E.D. Ill. 1959), affm'd. 279 F. 2d 497 (7 Cir. 1960); *Bishop* v. *Review Committee, Venue V, Com. Stab. Serv.*, 298 F. 2d 386 (8 Cir. 1962). The chief purpose of the Act is to control the production of certain agricultural products, including rice. 7 U.S.C.A. 1282, 1304; *Fulford* v. *Forman*, 245 F. 2d 145 (5 Cir. 1957); *Wickard* v. *Filburn*, 317 U.S. 111, 130, 63 S. Ct. 82, 87 L. Ed. 122, 138. Since the Act and its attendant regulations do not vest in the plaintiffs any legally recognizable rights other than those specifically enumerated therein; and since administrative avenues have been carefully laid out along which an aggrieved party may travel while seeking redress, we must reason that the plaintiffs choosing not to travel the road to administrative review as provided for them, have placed before the court a controversy over which we lack the power to render a binding decision under the facts and in the circumstances here involved.[12]

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[12] After suit was filed, the State Committee determined that one of the plaintiffs was engaged in "the production of rice" and proper adjustment was made as to that plaintiff. Other rice

It may be that if the acts complained of are in fact, *ultra vires*, and beyond any powers granted to the defendants under the Act; then the plaintiffs are the victims of a simple action *ex delicto*, which may be maintained against the defendants individually much the same as against any other tort-feasor. Such a theory however, lends no support to the assertion of basic federal jurisdiction in this cause. See *Goltra* v. *Weeks*, 271 U.S. 536, 544, 70 L. Ed. 1074, wherein the Court stated:

> "Neither they [government agents] nor the Government which they represent could trespass upon the property of another, and it is well settled that they may be stayed in their unlawful proceeding by a court of competent jurisdiction, even though the United States for whom they profess to act *is not a party and cannot be made one.* By reason of their illegality, their acts or threatened acts *are personal* and *derive no official justification* from their doing them in asserted agency for the Government." (Emphasis added.)

We do not take the position that either the Act or the regulations pursuant to the Act are simple. We regard them as complicated, lengthy and difficult. See *Fulford* v. *Forman*, 245 F. 2d 145, 149. However, complexity and difficulty are not synonymous with arbitrariness, unreasonableness or invalidity. *Review Committee Venue VII* v. *Wiley*, 275 F. 2d 264, 272.

The language of the Act imports to us that an exclusiveness of jurisdiction and review is lodged within the framework of the administrating agency. *Weir* v. *United States*, 310 F. 2d 149, 156, 157 (8 Cir. 1962); *Miller* v.

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farmers of the class which the plaintiffs seek to represent, and who were involved in substantially the same difficulties as the plaintiffs, followed the review procedures provided by the Act and the trial court found that their cases were being entertained and moved to decision.

United States, 242 F. 2d 392, 395 (6 Cir. 1957); *Corbin* v. *United States,* 279 F. 2d 431, 432 (6 Cir. 1960); *Corpstein* v. *United States,* 262 F. 2d 200, 201 (10 Cir. 1958), Cert. denied, 359 U.S. 966; *Rigby* v. *Rasmussen,* 275 F. 2d 861, 865 (10 Cir. 1960); *Donaldson* v. *United States,* 264 F. 2d 805, 806 (6 Cir. 1959); *United States* v. *Jeffcoat,* 272 F. 2d 266, 271 (4 Cir. 1959); *United States* v. *Lillard,* 143 F. Supp. 113, 119 (U.S.D.C. W.D. Mo., S.D., 1956); *Paul* v. *United States,* 222 F. Supp. 102, 106 (U.S.D.C. E.D. North Carolina, 1963); *United States* v. *Bonderer,* 139 F. Supp. 391, 395, 396 (U.S.D.C. W.D. Mo., W.D. 1956); *United States* v. *Johnson,* 155 F. Supp. 898, 901, 902 (U.S.D.C. W.D. Ark. 1957).

The plaintiffs rely heavily on the case of *Hasty* v. *Carter,* (Ga. App. 1961) 123 S.E. 2d 563, and urgently insist that it constitutes judicial authority for their position and authorizes the relief sought. We do not so interpret the *Hasty* case. That case arose after review by the Review Committee and after the plaintiff had complied with the administrative remedies provided by the Act. There are also factual differences. In the instant case the plaintiffs had not marketed their crops when the defendants took action. In *Hasty* the tobacco had been marketed. The regulations applicable in *Hasty* are also different from those applicable here.

We are not unmindful of the recent case of *Morrow* v. *Clayton,* 326 F. 2d 36 (10 Cir. 1963) which, in effect, finds the presence of federal jurisdiction over controversies arising out of an allotment of acreage and marketing quotas adverse to the farmer which was determined by a State Committee, but fails to locate such jurisdiction where the adverse decision was rendered by a local county committee.

The crucial question for our determination is whether the court has jurisdiction to review and revise the action

of the County ASCS Committee; or, whether the plaintiffs must follow the administrative procedure of having their complaints first reviewed by the Review Committee. The plaintiffs contend that our case of *Fulford* v. *Forman*, 245 F. 2d 145 (5 Cir. 1957), is authority for the proposition that they are not required to first present their complaints to the Review Committee. We do not so interpret *Fulford*. We were there considering the power of the Review Committee to review complaints of farmers who were protesting only the allotment of the entire state quota by the State Committee among the various counties of the state. We were not dealing with a complaint by a farmer protesting the action of the County Committee as to allotments made by such Committee to specific individuals or farms. This fact is made clear by the opinion of Judge Dooley when the case was before the District Court, 144 F. Supp. 536, where the court had occasion to say, in speaking of the farmer's contention: "He found no fault, however, with the action of the County Committee, and thought they had been fair and did the best they could under all of the circumstances, but pointed his grievance entirely against the State Committee." In affirming the action of the district court, our opinion in *Fulford* clearly rejected the contention there urged by the farmers that the language of Section 1363 is so broad that a Review Committee can review the action of the State Committee and even pass upon the actions of the Secretary himself. Concluding that such review was not authorized, this court ruled as follows:

> "Since the statute itself does not accord to the Review Committee power to consider things beyond those matters relating to the use and distribution of the County Allotment as established by the State Committee, the regulation, Section 711.30(b), 12 F.R. 1388, implements this approach and is obviously valid.

> "This does not mean that the cotton farmers are necessarily without the means of judicial review for those acts by the State Committee, the Secretary, or his other agencies, deemed to be not in accordance with law. What those rights are, or where, or how they may be asserted is not before us. We merely hold that the route through Sections 1363, 1365, 1366 is not the one."

We feel that *Morrow* supports *Fulford* and the conclusion here reached. In *Morrow*, the County Committee not only failed to act, but refused to act. Therefore, the court was not considering a complaint with respect to adverse action by the County Committee or whether such adverse action was reviewable by the Review Committee, as we are in the instant case. Indeed, *Morrow* concludes that district courts do not have jurisdiction of complaints by a farmer who has failed to exhaust his administrative remedies by proceeding under Section 1363 authorizing review by the County Review Committee; and further, that exhaustion of this administrative remedy is a prerequisite to court review. As indicated in *Morrow* there was no adverse action or decision by the County Committee or by the Review Committee so far as the complaining farmers were concerned. It was concluded, therefore, that since the County Review Committee was not authorized to review the actions of the State Committee or the actions of the Secretary himself, the complaining farmers in *Morrow* were not bound to exhaust the administrative remedies provided by Section 1363. That section is simply not applicable to actions by the State Committee. It is applicable to adverse decisions by the County Committee. In the case at bar we are asked in effect, to review adverse decisions by the County Committee, albeit that the primary cause for such actions and decisions by the County Committee were facts disclosed by the audit, and by State Committee action.

It is not the function nor duty of this court to rewrite statutory enactments in order to create a remedy where none has previously been held to exist. We must remain attentive to the policies enumerated by the framers of the Act, Title 7, § 1282, 1304, U.S.C.A. As was carefully stated by this court in *Fulford, supra:*

> "Of course the heart of the Act is the elimination of excessive supplies of cotton [here rice] . . . through a detailed scheme for regulating production."
>
> • • •
>
> "And control of . . . total supply, upon which the whole statutory plan is based, depends upon control of *individual supply.*" (Emphasis supplied.) Citing *Wickard* v. *Filburn,* 317 U.S. 111, 130, 63 S. Ct. 82, 87 L. Ed. 122, 138.

In the light of the foregoing, we find it impossible to superimpose a tenuous distinction upon the Act which would thwart and undermine its expressed legislative scheme for the determination and control of *individual supply.* We conclude, therefore, there was no error in the district court's rulings regarding its lack of jurisdiction and its denial of the appellant-lien creditors' right to intervene.

AFFIRMED.

[349] — Gewin

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20,169

S. B. ALLEN, ET AL.,

Appellants,

v.

W. LEWIS DAVID, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

(August 20, 1964)

ON PETITION FOR REHEARING

Before HUTCHESON, RIVES and GEWIN, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

S. B. ALLEN, ET AL.,

Appellants,

v.

W. LEWIS DAVID, ET AL.,

Appellees.

No. 20169

ON CONSIDERATION OF THE APPLICATION of the Appellants in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable them to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of 60 days; the stay to continue in force until the final deposition of the case by the Supreme Court, provided that within 60 days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 60 days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

DONE AT NEW ORLEANS, LA., THIS 27th day of August, 1964.

/s/ WALTER P. GEWIN

UNITED STATES CIRCUIT JUDGE

(Original Filed August 31, 1964)

APPENDIX B

(Statutes)

7 U.S.C. § 1301 (b)(10)(A):

"Normal supply" in the case of corn, rice, wheat, and peanuts for any marketing year shall be (i) the estimated domestic consumption of the commodity for the marketing year ending immediately prior to the marketing year for which normal supply is being determined, plus (ii) the estimated exports of the commodity for the marketing year for which normal supply is being determined, plus (iii) an allowance for carry-over. The allowance for carry-over shall be the following percentage of the sum of the consumption and exports used in computing normal supply: 15 per centum in the case of corn; 10 per centum in the case of rice; 20 per centum in the case of wheat; and 15 per centum in the case of peanuts. In determining normal supply the Secretary shall make such adjustments for current trends in consumption and for unusual conditions as he may deem necessary.

7 U.S.C. § 1304; Consumer Safeguards

The powers conferred under this chapter shall not be used to discourage the production of supplies of foods and fibers sufficient to maintain normal domestic human consumption as determined by the Secretary from the records of domestic human consumption in the years 1920 to 1929, inclusive, taking into consideration increased population, quantities of any commodity that were forced into domestic consumption by decline in exports during such period, current trends in domestic consumption and exports of particular commodities, and the quantities of substitutes available for domestic consumption within any general class of food commodities. In carrying out the purposes of this chapter it shall be the duty of the Secretary to give due regard to

the maintenance of a continuous and stable supply of agricultural commodities from domestic production adequate to meet consumer demand at prices fair to both producers and consumers.

7 U.S.C. § 1352:

The national acreage allotment of rice for any calendar year shall be that acreage which the Secretary determines will, on the basis of the national average yield of rice for the five calendar years immediately preceding the calendar year for which such national average yield is determined, produce an amount of rice adequate, together with the estimated carry-over from the marketing year ending in such calendar year, to make available a supply for the marketing year commencing in such calendar year not less than the normal supply: *Provided, however,* That for 1956 no national acreage allotment shall be established which is less than 85 per centum of the final allotment established for the immediately preceding year. Such national acreage allotment shall be proclaimed not later than December 31 of each year.

7 U.S.C. § 1353(a)(b):

(a) The national acreage allotment of rice for each calendar year, less a reserve of not to exceed 1 per centum thereof for apportionment by the Secretary as provided in this subsection, shall be apportioned by the Secretary among the several States in which rice is produced in proportion to the average number of acres of rice in each State during the five-year period immediately preceding the calendar year for which such national acreage allotment of rice is determined (plus, in applicable years, the acreage diverted under previous agricultural adjustment and conservation programs) with adjustments for trends in acreage

during the applicable period. The Secretary shall provide for the apportionment of the reserve acreage set aside pursuant to this subsection to farms receiving allotments which are inadequate because of an insufficient State or county acreage allotment or because rice was not planted on the farm during all of the preceding five years. Notwithstanding the foregoing provisions of this subsection, the reserve acreage set aside for the 1950 crop pursuant to this subsection shall not exceed one-half of 1 per centum and shall be in addition to the 1950 national acreage allotment as heretofore proclaimed by the Secretary and apportioned by him among the several rice-producing States and shall be available for apportionment to new farms without regard to the limitation contained in subsection (b) of this section.

(b) The State acreage allotment shall be apportioned to farms owned or operated by persons who have produced rice in the State in any one of the five calendar years immediately preceding the year for which such apportionment is made on the basis of past production of rice in the State by the producer on the farm taking into consideration the acreage allotments previously established in the State for such owners or operators; abnormal conditions affecting acreage; land, labor, and equipment available for the production of rice; crop rotation practices; and the soil and other physical factors affecting the production of rice: *Provided, That* if the State committee recommends such action and the Secretary determines that such action will facilitate the effective administration of this chapter, he may provide for the apportionment of part or all of the State acreage allotment to farms on which rice has been produced during any one of such period of years on the basis of the foregoing factors, using past production of rice on the farm and the acreage allotments previously established for the farm in lieu of past production of rice

by the producer and the acreage allotments previously established for such owners or operators: *Provided further,* That if the Secretary determines that part of the State acreage allotment shall be apportioned on the basis of past production of rice by the producer on the farm and part on the basis of the past production of rice on the farm, he shall divide the State into two administrative areas, to be designated "producer administrative area" and "farm administrative area", respectively, which areas shall be separated by a natural barrier which would prevent each area from being readily accessible to rice producers in one area for producing rice in the other area, and each such area shall be composed of whole counties; not more than 3 per centum of the State acreage allotment shall be apportioned among farms operated by persons who will produce rice in the State during the calendar year for which the allotment is made but who have not produced rice in the State in any one of the past five years, on the basis of the applicable apportionment factors set forth herein: *Provided,* That in any State in which allotments are established for farms on the basis of past production of rice on the farm such percentage of the State acreage allotment shall be apportioned among the farms on which rice is to be planted during the calendar year for which the apportionment is made but on which rice was not planted during any of the past five years, on the basis of the applicable apportionment factors set forth herein. In determining the eligibility of any producer or farm for an allotment as an old producer or farm under the first sentence of this subsection, or as a new producer or farm under the second sentence of this subsection, such producer or farm shall not be considered to have produced rice on any acreage which under subsection (c)(2) of this section is either not to be taken into account in establishing acreage allotments or is not to be credited to such producer. For purposes of this section in

States which have been divided into administrative areas pursuant to this subsection the term "State acreage allotment" shall be deemed to mean that part of the State acreage allotment apportioned to each administrative area and the word "State" shall be deemed to mean "administrative area", wherever applicable.

7 U.S.C. § 1354:

(a) Whenever in any calendar year the Secretary determines that the total supply of rice for the marketing year beginning in such calendar year will exceed the normal supply for such marketing year, the Secretary shall, not later than December 31 of such calendar year, proclaim such fact and marketing quotas shall be in effect for the crop of rice produced in the next calendar year.

(b) Within thirty days after the date of the issuance of the proclamation specified in subsection (a) of this section, the Secretary shall conduct a referendum by secret ballot of farmers engaged in the production of the immediately preceding crop of rice to determine whether such farmers are in favor of or opposed to such quotas. If more than one-third of the farmers voting in the referendum oppose such quotas the Secretary shall, prior to the 15th day of February, proclaim the result of the referendum and such quotas shall become ineffective.

7 U.S.C. § 1356(b):

The farm marketing excess of rice shall be regarded as available for marketing and the amount of penalty shall be computed upon the normal production of the acreage on the farm planted to rice in excess of the farm acreage allotment. If a downward adjustment in the amount of the farm marketing excess is made pursuant to the proviso in section 1355 of this title, the difference between the

amount of the penalty computed upon the farm marketing excess before such adjustment and as computed upon the adjusted marketing excess shall be returned to or allowed the producer.

7 U.S.C. § 1361:

This part shall apply to the publication and review of farm marketing quotas established for tobacco, corn, wheat, cotton, peanuts, and rice, established under the subtitle B.

7 U.S.C. § 1362:

All acreage allotments, and the farm marketing quotas established for farms in a county or other local administrative area shall, in accordance with regulations of the Secretary, be made and kept freely available for public inspection in such county or other local administrative area. An additional copy of this information shall be kept available in the office of the county agricultural extension agent or with the chairman of the local committee. Notice of the farm marketing quota of his farm shall be mailed to the farmer.

Notice of the farm acreage allotment established for each farm shown by the records of the county committee to be entitled to such allotment shall insofar as practicable be mailed to the farm operator in sufficient time to be received prior to the date of the referendum.

7 U.S.C. § 1363:

Any farmer who is dissatisfied with his farm marketing quota may, within fifteen days after mailing to him of notice as provided in section 1362 of this title, have such quota reviewed by a local review committee composed of three farmers from the same or nearby counties appointed by the

Secretary. Such committee shall not include any member of the local committee which determined the farm acreage allotment, the normal yield, or the farm marketing quota for such farm. Unless application for review is made within such period, the original determination of the farm marketing quota shall be final.

7 U.S.C.A. § 1367:

The commencement of judicial proceedings under this part shall not, unless specifically ordered by the court, operate as a stay of the review committee's determination. Notwithstanding any other provision of law, the jurisdiction conferred by this part to review the legal validity of a determination made by a review committee pursuant to this part shall be exclusive. No court of the United States or of any State shall have jurisdiction to pass upon the legal validity of any such determination except in a proceeding under this part.

7 U.S.C. § 1368:

Notwithstanding any increase of any farm marketing quota for any farm as a result of review of the determination thereof under this part, the marketing quotas for other farms shall not be affected.

7 U.S.C. § 1371:

(a) If at any time the Secretary has reason to believe that in the case of cotton, rice, peanuts, or tobacco the operation of farm marketing quotas in effect will cause the amount of such commodity which is free of marketing restrictions to be less than the normal supply for the marketing year for the commodity then current, he shall cause an immediate investigation to be made with respect thereto. In the course of such investigation due notice and oppor-

tunity for hearing shall be given to interested persons. If upon the basis of such investigation the Secretary finds the existence of such fact, he shall proclaim the same forthwith. He shall also in such proclamation specify such increase in, or termination of, existing quotas as he finds, on the basis of such investigation, is necessary to make the amount of such commodity which is free of marketing restrictions equal the normal supply.

(b) If the Secretary has reason to believe that, because of a national emergency or because of a material increase in export demand, any national marketing quota or acreage allotment for cotton, rice, peanuts, or tobacco should be increased or terminated, he shall cause an immediate investigation to be made to determine whether the increase or termination is necessary to meet such emergency or increase in export demand. If, on the basis of such investigation the Secretary finds that such increase or termination is necessary, he shall immediately proclaim such finding (and if he finds an increase is necessary, the amount of the increase found by him to be necessary) and thereupon such quota or allotment shall be increased, or shall terminate, as the case may be.

(c) In case any national marketing quota or acreage allotment for any commodity is increased under this section, each farm marketing quota or acreage allotment for the commodity shall be increased in the same ratio.

APPENDIX C

(Regulations)

Regulation 7 C.F.R. § 730.1303 (1963). National Acreage Allotment of Rice for 1962.

The normal supply of rice for the marketing year commencing August 1, 1962 is determined to be 65,711 thousand hundred weight (rough basis). The carry-over of rice on August 1, 1962, is determined to be 6,540 thousand hundred weight. Therefore the production of rice needed in 1962 to make available a total supply of rice for the 1962-63 marketing year equal to the normal supply for such marketing year is 59,171 thousand hundred weight. The national average yield of rice for the five calendar years 1957 through 1961 is determined to be 3,255 lbs. per planted acre. The national acreage allotment for rice of 1962 computed on the basis of production of rice needed in 1962 and the national average yield per planted acre of rice for the five calendar years, 1957 through 1961, is 1,817,856 acres. Since this amount is more than the total acreage allotment in 1956, which is the minimum for 1962 provided by law, the national acreage allotment of rice for the calendar year 1962 shall be 1,817,856 acres.

Regulation 7 C.F.R. § 730.1304 (1963). Apportionment of 1962 National Acreage Allotment of Rice among the several states.

The national acreage allotment proclaimed in Section 730.1303, less a reserve of 300 acres, is hereby apportioned among the several rice-producing States as follows:

State	Acres
•	•
•	•
•	•
Texas	464,552

Regulation 7 C.F.R. § 730.1011(g)(2) (1963):

"Engaged in the production of rice" means, for 1960, and subsequent crops, actively participating as a producer in the farming operations necessary to produce and harvest a crop of rice on a farm and the sharing in a predetermined and fixed portion of the rice crop, or the proceeds thereof, at the time of harvest by virtue of furnishing as landowner or landlord the land on which the rice is being produced, or by furnishing as tenant or sharecropper the labor, water or equipment necessary to produce and harvest the crop. A producer furnishing land must establish to the satisfaction of the county committee that he will have control of such land throughout the crop year, either through ownership or a valid lease. A producer furnishing labor, water or equipment must establish to the satisfaction of the county committee that he will furnish the labor, water or equipment necessary to produce and harvest an acreage of rice equivalent to not less than the acreage of rice planted on the farm by virtue of his producer allotment contribution to the farm acreage allotment. Furnishing labor, water or equipment for only a phase of production or harvest shall not be considered engaged in the production of the crop. Notwithstanding the above, any producer having control over land that meets the definition of developed rice land, who requests the allocation of his producer allotment to a farm for the purpose of diverting an acreage from the production of rice under the conservation reserve program of the soil bank, shall be considered to be engaged in the production of rice. Any producer who the county committee finds, after allocation of the producer allotment to the farm, is not participating in the production of a crop of rice, shall not be deemed to be engaged in the production of rice on the farm in accordance with § 730.1021(e).

Regulation § 730.1011(g)(3); 28 Fed. Reg. 175 (1963)

"Engaged in the production of rice" means, for 1963 and subsequent crops, having an interest in the production of an acreage of rice being produced on a farm and receiving at the time of harvest, a predetermined and fixed portion of such crop or the proceeds thereof, by virtue of furnishing land, labor, water, equipment or "producer" allotment acreage which has been approved as a part of "farm" acreage allotment determined for a farm. Any producer who the county or state committee finds, after allocation of his producer allotment to a farm, is not engaged in the production of rice on the farm as provided in accordance with this paragraph, shall not be deemed to be engaged in the production of rice on the farm when such determination has been made in accordance with Section 730.1021(e).

Regulation 7 C.F.R. § 730.1021(d) (1963):

Before approving a producer's request for the allocation of allotment acreage to a farm, the county committee must satisfy itself that the applicant will be actively engaged in the production of rice on such farm or, if not, that he is requesting the allocation of his producer allotment acreage to the farm for the purpose of (1) participating in the conservation reserve program, or (2) in order that in 1959 his allotment may be preserved for history purposes under the provisions of Public Law 85-266. To be considered actively engaged in the production of rice, the applicant must meet the definition of the term "engaged in the production of rice" as stated in paragraph (g) of § 730.1011. No request for the allocation of producer allotment acreage to a farm by a tenant will be approved unless the county committee is satisfied that such tenant will be making an active contribution toward the production of the crop on the farm throughout the normal period required to produce and harvest a crop of rice.

Regulation 7 C.F.R. § 730.1021(e) (1963):

If the county or state committee has reason to believe, after the establishment of any farm acreage allotment in accordance with this section, that a tenant whose allotment acreage was allocated to such farm is not, or was not in fact actively participating in the production of the rice crop produced on the farm in such year, a hearing shall be scheduled by the county committee and the tenant shall be invited to be present, or to be represented, at which time he shall be given an opportunity to substantiate his claim that he is, or was, actively engaged in the production of rice on the farm as indicated at the time of filing his request for the allocation of his producer allotment to the farm. If the county committee, with state committee approval, or the state committee finds that such tenant is not, or was not, actively participating in the production of the rice crop on the farm, except where allocation was made for the purpose of participating in the conservation reserve program or for the preservation of acreage, and therefore did not actively engage in the production of rice on such farm in the year in question, the county committee shall with the approval of the State committee recall such producer's allotment acreage previously allocated to the farm and adjust the farm rice acreage allotment accordingly. The county committee shall notify the farm operator of the revised farm acreage allotment. Such notice shall be on an official Form MQ-24 and will be accompanied by a letter of explanation as to the reason such action was taken to reduce the farm acreage allotment. A copy of the notice and letter shall be forwarded to all persons engaged in the production of rice on the farm. Any allotment acreage recalled by the county committee under this section shall not be available for apportionment or reallocation to any other farm.

APPENDIX D

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20,169

S. B. ALLEN, ET AL,

Appellants,

v.

W. LEWIS DAVID, ET AL,

Appellees.

MOTION TO DISSOLVE INJUNCTION PENDING APPEAL

Come now the Appellees herein and move the Court to dissolve the Injunction Pending Appeal which has heretofore been granted by the District Court for the Southern District of Texas, and as grounds therefor would show the following:

I.

In its Final Judgment in Civil Action No. 14,528, Houston Division, Southern District of Texas, from which this appeal was taken, the District Court dismissed this action for want of jurisdiction. This took place on October 29, 1962. Appeal was duly perfected by Plaintiffs.

II.

On November 8, 1962, the District Court granted an Injunction Pending Appeal wherein Defendants and the classes they represent were enjoined "during the pendency

of this appeal (1) from cancelling rice marketing cards or certificates heretofore issued and (2) from retroactively cancelling or revising rice farm acreage allotments and marketing quotas."

III.

On July 16, 1964, this Court handed down its opinion affirming the judgment of the trial Court. Motion for Rehearing was filed by Appellants and was overruled on August 20, 1964, without opinion.

IV.

Appellants moved this Court to stay its mandate. On August 27, 1964, the Court entered its order staying the mandate for sixty (60) days from that date. Appellants have stated in their motion that they intend to apply to the Supreme Court of the United States for a writ of certiorari.

V.

Appellees have been restrained and enjoined from reopening and reprocessing numerous rice acreage allotments and rice marketing quotas which probable cause exists to believe were illegally obtained from November 8, 1962, to this date.

VI.

Subsequent to the entry of the Injunction Pending Appeal on October 28, 1963, there has been enacted Public Law 88-160, which reads as follows:

> "That in a State in which farm rice acreage allotments are determined on the basis of past production of rice by the producer on the farm, any producer rice acreage allotment found by the ASC county committee or the ASC State committee to have been properly apportioned from the State rice acreage allotment and the acreage allotment for any farm to which such producer allotment has been allocated and approved by

the county committee in good faith for any crop year 1956 to 1962, both inclusive, shall be deemed to have been validly established and shall remain in effect, and the farm marketing quota and farm marketing excess, if any, shall be determined on the basis of such valid farm rice acreage allotment.

"This resolution shall not apply to any producer rice allotment or any planted rice acreage that has been obtained by duplication, forgery, bribery, intimidation, or practices that would result in the total allotted acreage in the State exceeding the State acreage allotment, less any unallocated reserve acreage." 77 Stat. 279, 7 U.S.C. Supp. V, § 1353, note.

Such public law is not self-executing. It is necessary to determine as to each questioned allotment whether or not such allotment "has been obtained by duplication, forgery, bribery, intimidation, or practices which would result in the total allotted acreage in the State exceeding the State acreage allotment, less any unallocated reserve acreage." Such determination cannot be made during the pendency of the said injunction.

VII.

It is the view of the United States Department of Agriculture that allotments aggregating not less than 3,063 acres with regard to 1961 farm allotments, 3,319 acres with regard to 1960 farm allotments, and 3,073 acres with regard to 1959 farm allotments have not been validated by the said public law. Upon administrative determination to this effect, and after such judicial review as may be available and be invoked, monetary penalties for overplanting will be due the United States. As to the penalties involved in the 1959 allotments, limitation may run on December 20, 1964, by reason of Title 28 U.S.C. § 2462, and the penalties thus be lost to the United States unless the Injunction Pending Appeal be dissolved.

VIII.

The trial Court has held itself to be without jurisdiction to grant injunctive relief to Plaintiffs-Appellants, and this holding has been unanimously affirmed by a panel of this honorable Court. To leave the present injunction in force is thus to give in substance to the Plaintiffs relief to which they have been held not to be entitled, and as to which their chances of ultimately prevailing are remote.

For the above and foregoing reasons, Defendant-Appellees pray that the Injunction Pending Appeal now in effect herein be forthwith dissolved.

WOODROW SEALS
United States Attorney

By: JAMES R. GOUGH
Assistant United States Attorney

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 619

S. B. ALLEN, ET AL., PETITIONERS

v.

W. LEWIS DAVID, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the United States District Court for the Southern District of Texas (R. 352) is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. 3a) is reported at 334 F. 2d 592.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1964 (Pet. 1a). A petition for rehearing, timely filed, was denied on August 20, 1964 (Pet. 21a). The petition for a writ of certiorari was filed on October 26, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

755-053—64

QUESTION PRESENTED

Whether petitioners' complaint was properly dismissed for failure to exhaust their administrative remedies.

STATUTE AND REGULATIONS INVOLVED

The pertinent parts of the Agricultural Adjustment Act of 1938, as amended, 7 U.S.C. 1281, *et seq.*, and of the regulations promulgated by the Secretary of Agriculture in implementation of that Act, are set forth in the appendix to the petition, pp. 23a–34a.

STATEMENT

This action was brought by seven Texas rice producers on behalf of themselves and others similarly situated to enjoin the respondents, members of the Texas State Agricultural Stabilization Committee, from cancelling and retroactively revising rice acreage allotments that previously had been issued for the 1962 crop year. The cancellations were based upon the finding that the allotments had been obtained fraudulently. The district court, concluding that petitioners had failed to exhaust the administrative remedies provided in the Agricultural Adjustment Act (7 U.S.C. 1281, *et seq.*), notably the remedy of *de novo* review by the local review committee under 7 U.S.C. 1363, dismissed for lack of jurisdiction, and the court of appeals affirmed.

1. THE STATUTORY AND REGULATORY SCHEME

Under the Agricultural Adjustment Act, the Secretary of Agriculture is required to determine a national acreage allotment for rice and apportion it among the several rice producing States. 7 U.S.C.

1353(a). The State acreage allotment is then apportioned to farms owned or operated by "persons who have produced rice in the State in any one of the five calendar years immediately preceding the year for which such apportionment is made * * *." 7 U.S.C. 1353(b). By regulations issued under 7 U.S.C. 1375 (b), the Secretary has provided that the county committee, before approving a producer's request for an acreage allotment, must satisfy itself that the applicant "will be actively engaged in the production of rice on such farm"—*i.e.*, that the producer has furnished land, labor, equipment or water adequate to service the entire allotment claimed, 7 C.F.R. 730.1021 (d), 7 C.F.R. 730.1011(g)(2). The regulations further provide that if the county or State committee has reason to believe, after the establishment of a farm acreage allotment, that a tenant whose acreage was allocated to a particular farm was not in fact actively participating in the production of the rice crop produced on the farm in a particular year, the county committee (with the approval of the State committee) may recall the producer's allotment acreage and adjust the farm's allotment accordingly. 7 C.F.R. 730.1021(e).

Notice of the farm marketing quota must be mailed to the farmer, and any farmer dissatisfied with his quota may have it reviewed by a local review committee composed of three farmers from the same or nearby counties. 7 U.S.C. 1363. If the farmer is dissatisfied with the determination of the review committee he may, within 15 days, file a bill in equity in the district court, naming the review committee as the defendant. 7 U.S.C. 1365. Review is limited to ques-

tions of law, and the findings of fact by the review committee, if supported by evidence, are conclusive. 7 U.S.C. 1366. The statute provides that this review procedure shall be exclusive. 7 U.S.C. 1367.

2. THE PROCEEDINGS IN THIS CASE

Petitioners, by applications filed with their local county ASC committees, applied for and received rice acreage allotments for the 1962 crop year. The allotment authorizations expressly provided that the allotment would remain subject to revision should it later be determined that the allotment was established on the basis of incorrect information supplied by the applicant. Subsequently, an investigation by the Internal Audit Division of the Department of Agriculture disclosed that several Texas farmers had supplied erroneous information to their county ASC committees for the purpose of obtaining rice allotments.

In August, 1962, the county ASC committee held hearings to investigate the findings of the Internal Audit Division, and concluded that, notwithstanding their representations to the contrary, several Texas farmers who had applied for and received rice acreage allotments had not been "actively engaged in the production of rice." Accordingly, the fraudulently obtained allotments were cancelled and, pursuant to 7 U.S.C. 1356, penalties for overproduction were assessed against the farms that had enjoyed those allotments.

Instead of first availing themselves of their statutory right to have their quotas "reviewed by a local

review committee" (7 U.S.C. 1363), petitioners, whose allotments were cancelled, instituted this suit. Both courts below held that the procedure for review prescribed in the Act could not be circumvented and dismissed the complaint for failure to exhaust administrative remedies.

ARGUMENT

Petitioners seek to circumvent the procedures prescribed in the Agricultural Adjustment Act for the review of acreage allotments and marketing quotas. Both courts below agreed that petitioners had failed to exhaust available administrative remedies. Since that conclusion is correct and there is no conflict of decisions, further review by this Court is not warranted.

1. It is settled that a court may not entertain a suit before the administrative process is exhausted. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535; *Corpstein* v. *United States*, 262 F. 2d 200 (C.A. 10), certiorari denied, 359 U.S. 966. The Agricultural Adjustment Act of 1938, as amended, expressly provides for administrative review before a local review committee for any farmer who is dissatisfied with his farm marketing quota. 7 U.S.C. 1363. Only after resorting to that administrative remedy may the farmer, by a bill in equity, seek review in the district court. The proceeding thus instituted, which the statute expressly provides shall be exclusive, is based entirely upon the administrative record; review is limited to questions of law; and the findings of the review committee, if supported by substantial evi-

dence, are conclusive. Moreover, Congress provided not only that the record and findings of the review committee should be the sole basis for judicial scrutiny, but also that the review committee itself must be the party defendant. 7 U.S.C. 1366.

The courts have uniformly held that the review committee may not be bypassed—even where the committee's jurisdiction is under attack, *Rigby* v. *Rasmussen*, 275 F. 2d 861 (C.A. 10); *Miller* v. *United States*, 242 F. 2d 392 (C.A. 6), certiorari denied, 355 U.S. 833; *United States* v. *Bonderer*, 139 F. Supp. 391 (W.D. Mo.) or where the constitutionality of the statute is drawn into question, *Corpstein* v. *United States*, 262 F. 2d 200 (C.A. 10), certiorari denied, 359 U.S. 966; *Lee* v. *Roseberry*, 94 F. Supp. 324 (E.D. Ky.), and 200 F. 2d 155 (C.A. 6).[1] That rule is no less applicable where, as here, the applicants are challenging, not the acreage allotments as originally issued, but their reduction to zero by later cancellation. Plainly, therefore, the courts below were correct in concluding that they lack jurisdiction to entertain petitioners' premature complaint.

2. While the merits of the case are not now before this Court, we note that there is no substance to the

[1] For other cases holding that district courts do not have jurisdiction in situations where the administrative remedy established by 7 U.S.C. 1363 has not been exhausted see: *Weir* v. *United States*, 310 F. 2d 149 (C.A. 8); *United States* v. *Jeffcoat*, 272 F. 2d 266 (C.A. 4); *Donaldson* v. *United States*, 258 F. 2d 591 (C.A. 6); *Crolley* v. *Tatton*, 249 F. 2d 908 (C.A. 5), certiorari denied, 356 U.S. 966; *United States* v. *Strangland*, 242 F. 2d 843 (C.A. 7); *United States* v. *Jonnson*, 155 F. Supp. 898 (W.D. Ark.); *United States* v. *Lillard*, 143 F. Supp. 113 (W.D. Mo.); *Hawthorne* v. *Fisher*, 33 F. Supp. 891 (N.D. Tex.).

contention that the Secretary lacks authority to cancel retroactively acreage allotments procured through misrepresentation. In the exercise of his statutory duty to issue necessary regulations (7 U.S.C. 1375 (b)), the Secretary has provided that an allotment issued on the strength of information supplied by an applicant may be canceled if that information is later determined to be false. It is axiomatic that a duly issued administrative regulation may be overturned only if it is "unreasonable and plainly inconsistent with" the statute it is designed to implement. *Commissioner of Internal Revenue* v. *South Texas Lumber Co.*, 333 U.S. 496, 501; *accord, e.g., United States* v. *Shimer*, 367 U.S. 374, 381–383; *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 90. Here the administrative reservation of the right to recall allotments predicated on erroneous information is clearly reasonable and is not inconsistent with any provision of the statute.[2]

Moreover, petitioners were fully apprised of the fact that the mere issuance of allotments would not serve to insulate them from the imposition of penalties should it subsequently be found that their privilege was obtained through fraud. For every rice

[2] Petitioners' reliance on 7 U.S.C. 1363 (Pet. 10–15) which provides that a farm marketing quota is final unless, within fifteen days, an application for review is filed with the local review committee is misplaced. That provision merely defines the right of the farmer to obtain administrative, and ultimately judicial, review. It is not intended to limit the right of the Secretary to correct any allotment or marketing quota obtained through fraud or misrepresentation. To construe it otherwise would be to put a premium on non-disclosure.

farm operator is given explicit notice at the time he receives his acreage allotment and marketing quota that an allotment "is subject to such changes as may be necessary * * * taking into account * * * any incorrect data or information used in establishing this allotment * * *."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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